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Bowen v. Kendrick: Church and State, and the Morality of Teenage Sex

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BOWEN v. KENDRICK CHURCH AND STATE, AND THE MORALITY OF TEENAGE SEX

INTRODUCTION

Congress passed the Adolescent Family Life Act (the "AFLA" or the "Act") in 1981 to promote care services for pregnant adolescents, counsel pregnant adolescents about the alternatives to abortions, and study the problems associated with adolescent pregnancy.¹ The Act requires grantees to describe the manner in which they will encourage community groups, including religious organizations, to participate in their programs.² This Note

1. 42 U.S.C. § 300z (1982 and Supp. III 1985). Under section 300z 1(a)(4)(G), services that the AFLA promotes include:

- (i) information about adoption;
- (ii) education on the responsibilities of sexuality and parenting;
- (iii) the development of material to support the role of parents as the provider of sex education;
- (iv) and assistance to schools, youth agencies, and health providers to educate adolescents and preadolescent concerning sexual self-discipline and responsibility in human sexuality

Id. Under section 300z-1(a)(4)(O), the AFLA provides "outreach services to families of adolescents to discourage sexual relations among unemancipated minors." *Id.*

2. The AFLA describes the role of religious organizations within the Act in four sections. First, the Act describes the idea that procreative issues "are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, *religious* and charitable organizations, voluntary associations, and other groups, in the private sector as well as services provided by publicly sponsored initiatives." 42 U.S.C. § 300z(a)(8)(B) (1988) (emphasis added). Second, the Act provides as follows:

[S]ervices encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, *religious* and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations

42 U.S.C. § 300z(a)(10)(C) (1988) (emphasis added).

Third, the AFLA describes the role of demonstration projects: The Secretary may make grants to further the purposes of this subchapter to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of § 300z-5 of this title for demonstration projects which the Secretary determines will help communities provide appropriate care and prevention services in easily accessible locations. . . . Demonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations.

42 U.S.C. § 300z-2 (1988) (emphasis added).

Finally, the requirements for application section of the AFLA, states that grant applicants

will focus upon whether the participation of religiously affiliated groups in the AFLA's counseling services is consistent with the establishment clause.³

Those who have studied issues concerning separation of church and state have adopted two basic approaches in analyzing whether a statute that provides funds to religiously affiliated groups, such as the AFLA, violates the establishment clause. First, some have concluded that a statute is constitutional unless it tends to advance a single national religion.⁴ Others have concluded that even if a statute does not advance a particular religion, it violates the establishment clause if it promotes religion in general.⁵ The United State Supreme Court has adopted the latter view.⁶

In *Bowen v. Kendrick*,⁷ the United States Supreme Court decided whether the AFLA unconstitutionally benefitted particular religions or religion in general by funding religiously affiliated organizations that provided procreative counseling. Kendrick argued that Bowen, the Secretary of Health and Human Services, could not administer the AFLA in a secular manner because of the significant risk that religiously affiliated groups would promote religion while counseling teenagers about sex and pregnancy.⁸ The *Kendrick* Court held the AFLA constitutional on its face and remanded the case to the district court to rule upon the statute as applied.⁹

This Note will describe the background of the establishment clause and the legislative history of the AFLA. Then, the procedural history of *Kendrick* will be summarized. Next, this Note will examine why the Court should have held the AFLA unconstitutional both on its face and as applied. Finally, this Note will examine the impact of the *Kendrick* decision upon future establishment clause cases, the AFLA, and similar programs.

"shall include" in their applications to the Secretary of Health and Human Services "a description of how [they] will, as appropriate in the provision of services . . . involve *religious* and charitable organizations, voluntary associations and other groups in the private sector as well as services provided by publicly sponsored initiatives." 42 U.S.C. §§ 300z-5(a) and 300z-5(a)(21) (1988) (emphasis added).

3. "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend I.

4. *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833); McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1986).

5. *Everson v. Board of Educ.*, 330 U.S. 1 (1947); Levy, *The Original Meaning of the Establishment Clause of the First Amendment*, in RELIGION AND THE STATE 85 (J. Wood, Jr., ed. 1985). See also Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352, 386 (1986) (Court should maintain neutrality between religion and nonreligion).

6. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

7. 108 S. Ct. 2562 (1988).

8. See Appellees' and Cross-Appellants' Brief at 26, *Bowen v. Kendrick*, 108 S. Ct. 2562 (No. 87-253).

9. 108 S. Ct. 2562 (1988).

I. BACKGROUND

A. *Early Establishment Clause Decisions*

Modern interpretation of the establishment clause began with the United States Supreme Court decision, *Everson v. Board of Education*.¹⁰ In *Everson*, the Court considered the constitutionality of a New Jersey statute that reimbursed parents for the costs of transporting their children to and from parochial schools in public transportation buses.¹¹ The *Everson* Court found that spending even a small amount of taxes in support of religious institutions violated the establishment clause.¹² Nevertheless, the Court held that a state may reimburse parents for the costs of transporting their children to and from parochial schools in public transportation buses if the school district also provided transportation to public school students.¹³ The Court emphasized that a total ban on funding of religious institutions and of the people

10. 330 U.S. 1 (1947). The *Everson* Court looked to the writings of James Madison and Thomas Jefferson to interpret the establishment clause. *Id.* at 11-12. Jefferson described the establishment clause as "a wall of separation between church and state." *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). Similarly, Madison stated that one should never have to pay any taxes in support of any religion. *Id.* at 12. The Virginia legislature expressed its support for Madison's and Jefferson's views when it passed the "Virginia Bill for Religious Liberty," which provided as follows:

[T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern. . . . That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever

Id. at 13 (quoting VIRGINIA BILL FOR RELIGIOUS LIBERTY 12 Hening, Statutes of Virginia 84 (1823); K. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 125 (1944)). Thus, the *Everson* Court concluded that government may not promote religion. *See id.* at 13. For further explication of *Everson* see Howard, *The Supreme Court as Uncertain Stonemason*, in RELIGION AND THE STATE 85 (J. Wood, Jr. ed. 1985).

11. *Everson*, 330 U.S. at 3.

12. The *Everson* Court explained: "No tax in any amount, large or small, can be levied to support any religious activities or institutions." *Id.* at 16. *Everson* interpreted the establishment clause to mean that "[n]either a state nor the federal government may set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15. Numerous scholars have agreed. *E.g.*, Levy, *supra* note 5, at 85; *see also* Braveman, *supra* note 5, at 386; *contra* Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does the Clause prohibit Congress from pursuing legitimate secular ends through nondiscriminatory sectarian means."); Lynch v. Donnelly, 465 U.S. 668, 678 (1984) ("The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.") (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833)) (brackets in original); McConnell, *supra* note 4, at 1 ("[T]he state itself is religiously pluralistic—not secular").

13. *Everson*, 330 U.S. at 2-3, 26.

who participate in religious organizations would be antagonistic to religion, instead of neutral.¹⁴ The Court compared the statute to a social welfare program that merely provided private school children the same opportunities for safety that the state offered public school children.¹⁵

The Court in *Abington School District v. Schempp*¹⁶ applied the *Everson* Court's requirement of neutrality toward religion in a two-part test to determine whether a statute promotes religion, and thus, violates the establishment clause.¹⁷ In *Abington*, the Court decided the constitutionality of a Pennsylvania law which required public school teachers to read the Bible at the beginning of each school day. Some children were excused from these readings upon their parents' request.¹⁸ The Court used a two-prong test to determine whether the statute had both a constitutional purpose and effect. The Court concluded that the statute had both the purpose and primary effect of establishing religion¹⁹ and therefore held that the law was unconstitutional.²⁰

In a subsequent case, the Court did not use either the purpose or effects test to evaluate an establishment clause claim. Rather, the Court, in *Walz v. Tax Commission*, considered whether the statute caused excessive entanglement between religion and government.²¹ The plaintiffs in *Walz* challenged New York City's practice of exempting religious organizations from property

14. *Id.* at 16-18.

15. The government's reimbursement to parents for the costs of transporting their children to parochial schools was held to be no more of an endorsement of religion "than services [such] as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks." *Id.* at 17-18. Although the Court allowed indirect aid to religion in *Everson*, it warned that the separation between church and state "must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18. A state may also lend the textbooks used in public schools to parochial school students when there is no evidence that the textbooks are being used in a sectarian manner because secular textbooks are not "instrumental in the teaching of religion." *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968). See *Zorach v. Clauson* 343 U.S. 306, 313-15 (1952). In *Zorach*, the Court upheld New York City's released time program, where public school students who received their parents' permission could leave the school to attend religious instruction at religious centers. No governmental entity funded any expenses of the instruction. The Court held that the program was constitutional because it did not promote religious coercion, but merely accommodated religious people. *Id.*

16. 374 U.S. 203 (1963).

17. *Id.* at 222 ("[T]o withstand the strictures of the Establishment Clause, there must be a secular purpose and primary effect that neither advances nor inhibits religion.").

18. *Abington*, 374 U.S. at 205.

19. *Id.* at 222-25.

20. *Id.*; see Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1440 (1966) (*Abington* was consistent with Madison's view that the establishment clause should serve as "a guarantee against such governmental support of not only one but 'all' orthodoxies"). See also Johnson, *Compliance and the Supreme Court Decision-Making*, 1967 WIS. L. REV. 170, 184-85. Local schools' interpretations of cases such as *Abington* will vary significantly. Some schools within religious communities will adapt to decision such as *Abington* by having prayers before lunch, instead of during classes. *Id.*

21. 397 U.S. 664 (1970).

taxes.²² The Court reasoned that the exemption prevented the active entanglement between government and religion that would result if government taxed the property of religious organizations.²³ Thus, the Court looked solely at whether the statute resulted in excessive entanglement in determining the constitutionality of statutes under the establishment clause, and held that the exemption was constitutional.²⁴

The *Walz* decision, however, added more confusion than guidance for courts evaluating establishment clause claims.²⁵ This is because *Walz* did not cite *Abington*, or the purpose and effects tests, and therefore courts did not know what test they should use.

B. *Lemon v. Kurtzman*

The Court did not base its establishment clause decisions on any single enduring test until *Lemon v. Kurtzman*.²⁶ In *Lemon*, the Court combined the purpose, effect, and entanglement prongs into one test.²⁷ The *Lemon* Court examined the constitutionality of two statutes: (1) a Rhode Island statute which allowed the state to directly pay part of parochial school teachers' salaries directly to the teachers;²⁸ and (2) a Pennsylvania statute which authorized the state to reimburse parochial schools for teachers' salaries.²⁹

The *Lemon* Court asserted that a statute violates the establishment clause if it violates any one of the following prongs: (1) the main legislative purpose must be secular; (2) the main effect of the statute must not be to promote or to hinder religion; and (3) the statute must not cause excessive entanglement between church and state.³⁰ The *Lemon* Court focused on the third

22. *Id.* at 666-67.

23. *Id.* at 674-78. According to the Court, the purpose of the law was to protect religious institutions from governmental oppression, rather than to support religion. *Id.* at 673. The Court reasoned that the exemption did not benefit religion per se because all nonprofit organizations, including "hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups," were tax exempt, not just those with religious affiliations. *Id.* Furthermore, all fifty states have exempted religious organizations from property taxes. There were no indications that America's long tradition of exempting religious organizations from paying property taxes had contributed to the establishment of religion. *Id.* at 676-78. *The Supreme Court 1969 Term*, 84 HARV. L. REV. 30, 131 (1971) [hereinafter *Supreme Court*] (main flaw of *Walz* is that the excessive entanglement test requires "case by case adjudication").

24. *Walz*, 397 U.S. at 668, 674-75.

25. *Cf.* Howard, *supra* note 10, at 96 (proliferation of tests has left little clarity) (citing *Everson*, 330 U.S. 1 (1947)).

26. 403 U.S. 602 (1971).

27. *Id.* at 611-15; Howard, *supra* note 10, at 91-92.

28. *Lemon*, 403 U.S. at 607-08.

29. *Id.* at 609-10.

30. *Id.* at 612-13. Some, such as Justice Harlan in *Walz*, contend that political divisiveness is a fourth and independent element of statutes which violate the establishment clause. *Walz*, 397 U.S. 665, 674 (1968). Justice Rehnquist disagrees. Howard, *supra* note 10, at 98 (citing *Mueller v. Allen*, 463 U.S. 388, 394-95, n.11 (1983)). The *Lemon* Court, however, did not

prong, excessive entanglement.³¹ In order to determine whether the statutes caused excessive entanglement, the Court looked at the nature of: (1) the institutions funded; (2) the aid given to the institutions; and (3) the relationship between the church and state in the government administration of the statutes.³²

First, the Court determined that the nature of the parochial schools was to promote religion and that religious officials influenced teachers' conduct.³³ Accordingly, the Court found that the schools were so intertwined with religion that there would be a significant risk that funding the schools would result in the promotion of religion.³⁴

Examining the second aspect of excessive entanglement, the type of aid given, the Court evaluated whether government's direct payments to teachers at parochial schools promoted religion.³⁵ The statutes that the *Lemon* Court invalidated, while providing funds for teachers in religious schools, prohibited governmentally funded teachers from teaching religion courses or using religious materials.³⁶ The district court found that the funded courses could hypothetically be taught in a secular manner.³⁷ Nevertheless, the Court reasoned that teachers at parochial schools often dedicate their lives to religion, and it would be unreasonable to expect them to separate their religious beliefs from their teaching.³⁸ The Court stated that if the statutes

consider political divisiveness to be an independent prong, but instead analyzed political divisiveness under the excessive entanglement prong. 403 U.S. 602, 623 (1971). *Accord* Kendrick v. Bowen, 657 F. Supp. 1547, 1569 (D.D.C. 1987) ("political divisiveness has never been the only ground for holding a statute unconstitutional").

31. *Id.* at 613-25. Although the Court held that the purpose of the statutes in question in *Lemon* had the clear secular purpose of improving the quality of secular education, it held that the statutes violated the third prong of the *Lemon* test, the excessive entanglement prong. *Id.* at 613-14. Because a statute is unconstitutional if it violates one of the three prongs, and the statutes in *Lemon* violated the excessive entanglement prong, the Court did not find it necessary to determine whether the statutes violated the effects prong (the second prong). *Id.*

32. *Id.* at 617-24.

33. *Id.* at 615, 620. The Court found that the Rhode Island statute contributed to the risk that government would advance religion because of a number of factors. *Id.* at 615, 617-18. First, religious officials could conveniently exercise religion within the schools because some of the schools in *Lemon* were near the parish churches. *Id.* at 615. Second, the schools placed religious symbols throughout the premises. *Id.* at 615. Third, nuns were often instructors and principals. *Id.* at 615, 617. Fourth, parish priests determined which teachers taught at the schools and influenced teachers' salary levels. *Id.* at 617. Fifth, instructors' handbooks advocated the teaching of religion in all classes. *Id.* at 618.

34. *Id.*

35. *Id.*

36. *Id.* at 608, 610.

37. *Id.* at 618 ("[T]he District Court found that religious values did not necessarily affect the content of the secular instruction," yet the Court concluded that there was "potential if not actual hazards of this form of state aid").

38. *Id.* at 618-19. "[T]he State may send a cleric, indeed even a clerical order, to perform a wholly secular task." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 746 (1976). However, there is a great risk that members of religious organizations will not separate their secular

were upheld, it could not be certain that state-subsidized teachers would not promote religion.³⁹ Thus, the Court concluded that a state which directly funded teachers at parochial schools created an unconstitutional risk that such funding would promote religion.⁴⁰

Third, the Court examined whether the New Jersey and Pennsylvania statutes contributed to entanglement between church and state because of the statutory nature of the relationship between religious organizations and government.⁴¹ The statutes required grantees to apply for annual funding.⁴² The Court predicted that each time one of the grantees requested to renew its grants, a split along religious lines would result with those religious groups which had few members in parochial schools bitterly resenting governmental funding of those religious groups which benefit most from aid to parochial schools.⁴³ The Court sought to avoid such a risk because potential "political division along religious lines was one of the principal evils against which the

beliefs from their religious beliefs in others tasks. "There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them." *Bowen v. Kendrick*, 108 S. Ct. at 2591 (Blackmun, J., dissenting).

39. *Lemon*, 403 U.S. at 619. ("The State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion.") (emphasis added); *Aguilar v. Felton*, 473 U.S. 402, 415 (1985) (Powell, J., concurring); *Meek v. Pittenger*, 421 U.S. 369, 372 (1975).

40. *Lemon*, 403 U.S. at 607, 609, 616, 621. The Pennsylvania statute had "the further defect of providing state financial aid directly to the church-related school," *id.* at 621, as opposed to giving the funds to the parents of the students in the form of subsidies. *See Everson v. Board of Educ.*, 330 U.S. 1, 26 (1947) (Court allowed state reimbursement to parents for transporting their children to parochial school). The *Lemon* Court quoted *Walz* to explain the dangers of government directly funding religious organizations:

Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards

Lemon, 403 U.S. at 621 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970)).

It would be quite cumbersome to prevent the statutes in *Lemon* from having effects that advance religion. "The conflict of functions inheres in the situation . . ." *Id.* at 617. The Court continued as follows:

A comprehensive, discriminating, and continuing state surveillance will inevitably be required. . . . Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Id. at 619.

41. *Id.*

42. *Id.* at 623.

43. *Id.* at 622-23. In Rhode Island, "nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic Church." *Id.* at 608. Similarly, in Pennsylvania, most of the private schools were affiliated with the Catholic Church. *Id.* at 610.

The resentment would probably increase over time as the government programs expanded, as most government programs do. "[M]odern governmental programs have self-perpetuating and self-expanding propensities." *Id.* at 624.

first amendment was intended to protect.”⁴⁴ Furthermore, in contrast to *Walz*, the benefit to parochial school in *Lemon* was innovative and risky because the tax exemption for religious property had existed for 200 years without creating an establishment of religion.⁴⁵ Thus, the Court held that the statutes created an unconstitutional entanglement between government and religion.⁴⁶

On the same day that the Court decided *Lemon*, the Court held in *Tilton v. Richardson*⁴⁷ that the funding of construction grants for colleges and universities imposed the same danger of entanglement of government and religion as the direct funding of teachers’ salaries at parochial elementary and secondary schools.⁴⁸ The disputed statute in *Tilton*, the Higher Education Facilities Act (“HEFA”), authorized construction grants for college and university buildings used exclusively for secular education.⁴⁹ The grantees included religiously affiliated institutions. In *Tilton*, as in *Lemon*, the Court focused on the excessive entanglement prong and examined the nature of: (1) the institutions funded; (2) the aid; and (3) the relationship between government and religion under the statute.⁵⁰

44. *Id.* at 622 (citing Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)). *Accord* *Meek v. Pittenger*, 421 U.S. 349, 372 (1975). In *Meek*, the Court invalidated a Pennsylvania law providing funding for support staff, as well as loans to nonpublic schools for secular instructional materials and equipment, holding that the funding would create “a serious potential for divisive conflict over the issue of aid to religion.” *Id.*

45. *Lemon*, 403 U.S. at 624.

46. *Id.* Since *Lemon*, the Court has continued to be reluctant to directly fund parochial elementary and secondary schools because such funding could be used in a sectarian manner. *E.g.*, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The *Ball* Court ruled upon the validity of a statute which provided funds for full-time public school teachers to teach some secular courses in the parochial schools. The Court held that the funding constituted a direct aid to schools that were almost all pervasively sectarian (forty of forty-one) and had an effect of promoting religion. *Id.* at 375-76, 385. In *Aguilar v. Felton*, the Court held that New York City could not use federal funds to pay the salaries of public school teachers to teach in parochial schools. The schools were pervasively sectarian, so it would require excessive entanglement of church and state in order to prevent a sectarian use of the federal funds. 473 U.S. 402, 404, 412 (1985). In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, the Court ruled that a direct subsidy of \$30 to \$40 dollars per student per year for maintenance and repair of facilities of the schools violated the establishment clause. The challenged New York statute required that all schools spend funds available through the statute on secular purposes. *See* 413 U.S. 756, 762-63 (1973).

The Court has only upheld direct aid to pervasively religious institutions when there are rigid controls to insure that grantees do not use funds in a pervasively sectarian manner. *E.g.*, *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980). For example, in *Regan* the Court upheld a New York statute reimbursing parochial elementary and secondary schools for the costs of administering and grading secular tests prepared by the state. *Id.* The Court allowed New York to reimburse private schools because the state audited the grantees to be sure that the funds that were reimbursed to schools did not exceed costs. *Id.* at 659-60.

47. 403 U.S. 672 (1971).

48. *Id.* at 674-77.

49. *Id.* at 675-76.

50. The Court held that the statute had the secular purpose of improving the education of college students. *Id.* at 678-79.

First, the Court reasoned that the nature of the typical college or university is substantially different from the nature of the typical private primary or secondary school.⁵¹ Colleges and universities, unlike parochial schools, generally have primary purposes and effects that are secular.⁵² Consequently, the Court reasoned that funding to religious colleges or universities would require less governmental monitoring.⁵³ Furthermore, college and university students are often less impressionable and less accepting of proselytism than parochial elementary and secondary school age students.⁵⁴ The Court suggested that religiously affiliated colleges and universities generally encourage academic freedom and critical analysis among student and faculty more than parochial elementary and secondary schools.⁵⁵ Additionally, the record in *Tilton* supported the Court's conclusion that the grantees were actually using their funds in a religiously neutral atmosphere.⁵⁶ Thus, the Supreme Court found that colleges and universities were not likely to be pervasively sectarian.⁵⁷

The second primary difference between the statutes in *Lemon* and the construction grants in *Tilton* involved the nature of the governmental aid required.⁵⁸ The aid in *Lemon* directly subsidized teachers who, themselves,

51. *Id.* at 684-86.

52. *Id.* at 686.

53. *Id.* at 687; *Cf. Aguilar v. Felton*, 473 U.S. 402, 412 (1985); *Meek v. Pittenger*, 421 U.S. 349, 371 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

54. *Tilton*, 403 U.S. at 686 ("There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.") (footnote omitted).

55. *Id.* at 686 ("Many church related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.") (footnote omitted).

56. The Court stated:

[A]ppellants' position depends on the validity of the proposition that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable. . . . This record . . . provides no basis for any such assumption here.

Id. at 680-81.

The institutions presented evidence that there had been no religious services or worship in the federally financed facilities, that there are no religious symbols or plaques on them, and that they had been used solely for nonreligious purposes. On this record, therefore, these buildings are indistinguishable from a typical state university facility.

Id. at 680. In contrast, in *Lemon* "[t]he school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings either in the classrooms or hallways." *Lemon*, 403 U.S. at 615.

Although most of the religiously affiliated colleges and universities were affiliated with Catholicism and most of the students were Catholic, the schools admitted non-Catholics as students, and the administration hired non-Catholics as faculty members. According to the Court, the fact that the schools in *Tilton* did not proselytize would reduce the risk of promoting religion. *Tilton*, 403 U.S. at 686-87.

57. *Id.* at 680.

58. *Id.* at 687-88.

had strong religious beliefs that might affect their teaching,⁵⁹ whereas the aid in *Tilton* funded religiously neutral buildings.⁶⁰ The Court concluded that it was easier to monitor buildings than to monitor the contents of teachers' instructions,⁶¹ and thus did not find the nature of the HEFA funding inherently religious.⁶²

Third, the *Tilton* Court concluded that the construction grants did not create a strong enough relationship between church and state to require much governmental monitoring to prevent the promotion of religion.⁶³ The fact that the construction grants were one-time grants diminished the degree of entanglement between church and state.⁶⁴ Because colleges and universities generally do not proselytize, government would not need to thoroughly inspect the use of the governmentally funded buildings at colleges and universities.⁶⁵ Thus, the Court concluded that the relationship between government and religion would not create excessive entanglement.⁶⁶

The *Tilton* Court discussed important factors to ascertain the extent to which it would be willing to endure the risks of establishment clause violations. The Court concluded that the possibility that the religiously affiliated organizations might use funds in a pervasively sectarian manner would not invalidate the statute when there was no evidence that the grantees who were receiving funding at the time of the Court's decision were using governmental funds to promote religion.⁶⁷

Even though the *Tilton* Court held that the primary aspects of HEFA were constitutional, it did hold that a part of the HEFA was unconstitu-

59. *Lemon*, 403 U.S. at 607.

60. *Tilton*, 403 U.S. at 687-88.

61. *Id.*

62. *Id.*

63. *Id.* at 688.

64. *Id.*

65. *Id.* The one-time construction grants provided in the HEFA would not require inspection of grantees' financial records, but would merely require occasional examination of the premises to determine whether the building was being used for religious purposes. *Id.* In contrast, the grants in *Lemon* required annual renewal, so political struggles over funding might occur annually along religious lines. *Lemon*, 403 U.S. at 623.

66. *Tilton*, 403 U.S. at 688.

67. *Id.* at 681, 686. At first glance, the Court's willingness to endure some unconstitutional effects might seem to conflict with *Lemon*, where the Court was unwilling to endure any possibility that secular school teachers would teach sectarian doctrine with state funds. "The State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion . . ." *Lemon v. Kurtzman*, 403 U.S. at 619 (emphasis added). For example, the *Tilton* Court stated:

A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.

Tilton, 403 U.S. at 679. However, the holdings of *Tilton* and *Lemon* were significantly different because *Tilton*, unlike *Lemon*, concluded that there was no evidence that the grantees receiving funding had used funds in a secular manner or were likely to use funds in a sectarian manner. *Id.* at 681, 686.

tional.⁶⁸ HEFA prohibited any grantee from using a funded building for any sectarian use for twenty years after the construction of the building.⁶⁹ After twenty years had passed, an institution could use the governmentally funded facilities as it pleased.⁷⁰ The Court concluded that the twenty-year provision would enable a grantee to use government funds for sectarian purposes, and thus might unconstitutionally advance religion.⁷¹

C. Supreme Court Decisions Since Lemon

After the *Tilton* Court concluded that the grantees under the Act could successfully separate their religious and secular activities, the Court in *Roemer v. Board of Public Works*⁷² narrowed the range of institutions that it considered ineligible for funding under the establishment clause.⁷³ In *Roemer*, the Court examined the constitutionality of a Maryland statute which provided grants for secular use to colleges and universities, which included religiously affiliated colleges.⁷⁴ Concluding that the institutions' primary purpose was secular teaching, the Court upheld the district court's finding that the institutions were not pervasively sectarian.⁷⁵ The Court also found that the district court's rulings were reasonable in light of the fact that most

68. *Id.* at 683.

69. *Id.* at 682-83. Grantees who violated the HEFA's provisions had to disgorge any funds they received. *Id.*

70. *Tilton*, 403 U.S. at 683.

71. *Id.* at 684. Nevertheless, the Court upheld the bulk of the statute because the unconstitutionality of a part of a statute does not invalidate the other provisions of the statute unless it is clear that the legislature would have been unwilling to pass only the constitutionally valid parts of the statute. *Id.* at 683-84 ("The cardinal principal of statutory construction is to save and not to destroy.") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). "The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 684 (quoting *Champlin Roofing Co. v. Commission*, 386 U.S. 210, 234 (1932)); *New York v. Ferber*, 458 U.S. 747, 770 (1981). See *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987). Thus, when the *Lemon* Court found the Rhode Island and Pennsylvania statutes totally invalid, it implicitly found that Rhode Island would not have passed a bill aiding only non-sectarian private elementary and secondary schools. See *Lemon v. Kurtzman*, 403 U.S. at 616.

72. 426 U.S. 736 (1976).

73. *Id.* At the time of *Roemer*, the Court considered an institution pervasively sectarian if "religion is so pervasive [within the institution] that a substantial portion of its functions are subsumed in the religious mission." *Tilton*, 403 U.S. at 752 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

74. *Roemer*, 426 U.S. at 739-40. Colleges and universities which provide mainly religiously oriented degrees were not eligible for funds. *Id.* at 741-42. The state board of public works administered the grants. *Id.*

75. *Id.* at 755-59. The schools' hiring and admissions policies were indicative of their purpose. Hiring and selection of students were not based upon religion, except to the extent that people from religious orders were often hired to reduce expenses. *Id.* at 756-57..

of the grantees under the statute had no religious affiliation.⁷⁶ Moreover, the state board had forbidden some sectarian uses of funds, such as funding religion classes and construction grants for buildings used for religious activities.⁷⁷ Although some of the educational institutions had voluntary Catholic services, mandatory religion classes, and prayers at the beginning of some classes, the Court determined that the colleges were not pervasively sectarian and upheld the statute providing funding.⁷⁸

In the years since *Lemon*, the Court has expressed its reluctance to find that a statutory purpose violates the establishment clause when it has a plausible secular purpose.⁷⁹ Nevertheless, since *Lemon*, the Court has held that a number of statutes have unconstitutional purposes.⁸⁰ For example, in *Stone v. Graham*,⁸¹ the Court decided the constitutionality of a Kentucky law which required public schools to post the Ten Commandments in each classroom.⁸² The Court concluded that the avowed purposes of the law were insincere and that its sole purpose was an unconstitutional attempt to advance religion.⁸³

Although the Court has invalidated various laws which violate the purpose prong of the *Lemon* test, the Court has rarely held that a statute violates the second or third prongs of the *Lemon* test unless the statute provides direct funds to parochial schools.⁸⁴ The Court has continued to follow *Everson v. Board of Education* by allowing indirect subsidies to parochial schools which parents for the costs of parochial school expenses if those benefits are granted in a facially neutral statute.⁸⁵ In other words, the statute

76. Compare *id.* at 765 with *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (Court found statute providing direct subsidy to schools, ninety-five percent of which had Roman Catholic affiliations, unconstitutional).

77. *Roemer*, 426 U.S. at 760 n.22 (Board's restrictions upon funding religious classes and construction of buildings where religion was taught reflected Board's intention to enforce statute's restriction upon sectarian use).

78. *Id.* at 755-56.

79. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). See also *Edwards v. Aguillard*, 482 U.S. 578 (1987) (stating reluctance to hold statute's purpose invalid, but ruling that the stated purpose was insincere); *Wallace v. Jaffree*, 472 U.S. 38, 66 (1985) (stating reluctance to find a statute's purpose unconstitutional, but concluding that record did not identify secular purpose) (Powell, J., concurring).

80. In *Edwards v. Aguillard*, the Court ruled that a Louisiana law which allowed evolution to be taught only if creationism was also taught was unconstitutional because it served no legitimate secular purpose. 482 U.S. at 586-89. The Court ruled that an Alabama statute allowing a period for prayer or meditation had no secular purpose. *Wallace v. Jaffree*, 472 U.S. at 40-42, 59-60 (1985). See also *Jaffree v. Board of School Comm'rs*, 459 U.S. 1314, 1315-16 (1983) (holding that an Alabama law "permitting public school teachers to lead their classes in prayer" was unconstitutional) (Powell, J. concurring).

81. 449 U.S. 39 (1980).

82. The copies of the Ten Commandments were purchased with private contributions. *Id.* at 42.

83. *Id.* at 42-43.

84. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

85. *Id.*

must provide the benefits to those who go to public schools, as well as private schools, even if few public school students are eligible for the benefit.⁸⁶ Thus, a statute which provided tuition reimbursements only for the parents of nonpublic school students was found unconstitutional in *Committee for Public Education & Religious Liberty v. Nyquist*.⁸⁷ Yet, the Court held that a statute which allows tuition reimbursements to all parents who paid tuition, constitutional in *Mueller v. Allen*.⁸⁸ Although the *Mueller* Court admitted that the economic effect of reimbursing parents for their children's private school expenses is identical to the effects of directly subsidizing the private schools,⁸⁹ the Court held that only direct subsidies of parochial schools are unconstitutional.⁹⁰

In *Marsh v. Chambers*,⁹¹ the Court temporarily abandoned the *Lemon* test and further narrowed the scope of practices it considered pervasively sectarian.⁹² In *Marsh*, the Court examined whether Nebraska's practice of beginning each meeting of the legislature with a prayer led by a chaplain who drew a salary from governmental funds violated the establishment clause.⁹³ The Court compared the Nebraska legislature to the United States Congress which had employed a chaplain for nearly two centuries.⁹⁴ As in *Walz v. Tax Commission*,⁹⁵ the Court chose not to invalidate a tradition that had not caused any blatant establishment of religion.⁹⁶

The Court reduced the scope of what constitutes pervasively sectarian activity even further when it decided in *Lynch v. Donnelly*,⁹⁷ that government employees may place creches on public property.⁹⁸ Applying the *Lemon* test, the Court reasoned that any resulting endorsement of Christianity resulting

86. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 764 (1973).

87. 413 U.S. 756 (1973). Where eighty-five percent of the nonpublic school elementary and secondary school students in New York went to sectarian schools, the Court found that it violated the establishment clause to reimburse parents of the students for part of the tuition costs. *Id.* at 764, 768. "[I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." *Id.* at 793.

88. 463 U.S. 388 (1983). In *Mueller*, ninety-five percent of the nonpublic elementary and secondary students attended sectarian schools. The Court held it constitutional for the childrens' parents to deduct some of their tuition and transportation expenses from their income taxes. *Id.* at 398.

89. *Id.* at 399.

90. *Id.* The Court did not explain why indirect subsidies create less danger of an establishment of religion. See also Note, *Mueller v. Allen: A New Standard of Scrutiny Applied to Tax Deductions for Educational Expenses*, 1984 DUKE L.J. 983 (indirect subsidies to parochial schools create little risk of establishment of religion).

91. 463 U.S. 783 (1983).

92. *Id.* at 793.

93. *Id.* at 786.

94. *Id.* at 787-789.

95. 397 U.S. 664 (1970).

96. *Marsh*, 463 U.S. at 793-95.

97. 465 U.S. 668 (1984).

98. *Id.* at 671.

from a creche on public property would be, at most, minimal.⁹⁹ The *Lynch* Court reasoned that the placing of a creche on public property was no more of an endorsement of Christianity than placing a piece of art with Christian symbols in a publicly funded art museum¹⁰⁰ and, therefore, constitutional.¹⁰¹

Although the scope of activities that the Court considers pervasively sectarian has narrowed since the *Lemon* decision, the Court continues to use the *Lemon* test. The Court has, however, restricted its standards of what constitutes an establishment clause violation with respect to the effects and entanglement prongs of *Lemon*.¹⁰² Despite the Court's reluctance to invalidate a statute with a plausibly secular purpose, it has invalidated some statutes which have sectarian purposes or allow direct funds to parochial schools.

II. THE AFLA AND THE *BOWEN V. KENDRICK* DECISION

A. Statutory Background of the AFLA

The stated purpose of the AFLA¹⁰³ is to provide services and research in order to prevent teenage sex and pregnancy.¹⁰⁴ The statute does not provide federal funding for any abortion clinics or abortions, but funded programs may refer a pregnant adolescent to an abortion counseling service if the adolescent and her parents request a referral.¹⁰⁵

Disputes over the AFLA's possible establishment clause violations arose because it requires potential grantees to describe how they will involve religious organizations within their respective communities.¹⁰⁶ The Senate Committee on Labor and Human Resources Report on the AFLA stated that religion was not one of the factors for determining which groups receive

99. *Id.* at 683. The creche cost about \$20 a year to set up and to dismantle. *Id.* at 671; *Contra Braveman, supra* note 5, at 385-86 ("[T]he Court [in *Lynch*] willingly embraced a sacred religious symbol of a specific denomination.").

100. *Lynch*, 465 U.S. at 683. *Contra Redlich, Nativity Scene Insults Jews*, N.Y. Times, Mar. 26, 1984, at A19, col. 2.

101. *Lynch*, 465 U.S. at 687.

102. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984).

103. 42 U.S.C. § 300z (1988).

104. *See supra* notes 1-2; *Bowen v. Kendrick*, 108 S. Ct. 2562, 2566 (quoting S. REP. NO. 161, 97th Cong., 1st Sess. 1 (1981)). "[T]he AFLA is essentially a scheme for providing grants to public or nonprofit private organizations or agencies 'for services and research in the area of premarital adolescent sexual relations and pregnancy,'" and "the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood," *Id.* at 2566-71. In other words, "encouraging sexual restraint among young people." *Id.* at 2582 (O'Connor, J., concurring).

105. "[P]rograms or projects which do not provide abortions or abortion counseling or referral, [or] . . . advocate, promote or encourage abortion." *Kendrick*, 108 S. Ct. at 2567-68 n.3 (quoting 42 U.S.C. § 300z-10(a)).

106. *See supra* note 2 and accompanying text.

funding under the AFLA.¹⁰⁷ Nevertheless, the AFLA wording specifies that grant applicants "shall include" in their applications to the Secretary of Health and Human Services a description of the manner in which they will include religious and other community groups in their programs.¹⁰⁸

B. Facts and Procedure of Bowen v. Kendrick

The plaintiffs in *Bowen v. Kendrick*,¹⁰⁹ a group of "federal taxpayers, clergymen, and the American Jewish Congress,"¹¹⁰ alleged that the AFLA violated the establishment clause both on its face and as applied.¹¹¹ Kendrick challenged two parts of the AFLA: (1) the portion that required all applicants for AFLA funding to describe the manner in which they plan to involve religious groups within their respective communities in their programs;¹¹² and (2) the part which forbids funding to groups which advocate abortion, or provide abortions or abortion counseling.¹¹³

Kendrick alleged a number of reasons for his conclusion that the funding of a number of grantees had violated the establishment clause.¹¹⁴ First,

107. S. REP. NO. 161, 97th Cong., 1st Sess., at 16 (1981) ("Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents.").

108. 42 U.S.C. §§ 300z-5(a), 300z-5(a)(21) (1982 & Supp. III 1985); The Senate Report described the Act as "promoting the involvement of religious organizations" and that religious groups should be included in the program because of their positive moral influence. See S. REP. NO. 161, 97th Cong., 1st Sess., at 15-16 (1981) ("Recognizing the limitations of Government in dealing with a problem that has complex moral and social dimension, the committee believes that promoting the involvement of religious organizations in the in the solution to these problems is neither inappropriate or illegal.").

109. 108 S. Ct. 2562 (1988).

110. *Id.* at 2568. Although there were multiple plaintiffs to both the district court decision and the Supreme Court decision, this Note will hereinafter refer to Chan Kendrick as the plaintiff.

111. *Id.* at 2568. See also *id.* at 2579 ("[F]ederal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Art. I, § 8, of the Constitution."). The defendants did not dispute that Kendrick had standing to challenge the AFLA on its face, but challenged Kendrick's standing to challenge the AFLA as applied. The Court held that Kendrick had standing.

112. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1553 (D.D.C. 1987).

113. *Id.* ("The plaintiffs contend that these two sections, when read together, not only permit religious organizations to use government funds to provide counseling-type services, but restrict AFLA funding of religious organizations to those that oppose abortion.").

114. *Bowen v. Kendrick*, 108 S. Ct. 2562, 2568 (1988). The majority in *Kendrick* stated that the government provided \$10.7 million in AFLA grants, religiously affiliated grantees received \$3.3 million, and that the grantees that the district court cited for establishment clause violations received \$1.3 million. *Id.* at 2575 n.12. The thirteen grantees which the district court cited received over \$10 million of the \$53.5 million which the government allocated to the AFLA. *Id.* at 2585 n.3 (Blackmun, J., dissenting). Another 13 religiously affiliated organizations received \$6 million of the \$53.5 million. *Id.* Furthermore, "a third of the approximately 100,000 'clients served' by all AFLA grantees during the 1985-86 period received their services from 'cited' grantees, and nearly 11,000 more from the other 'religiously affiliated' institutions." *Id.*

The district court concluded that at least ten grantees which received funding between 1982 and 1986 violated the establishment clause. 657 F. Supp. at 1565 (footnote omitted).

Kendrick provided examples of grantees or subgrantees who directly taught religious doctrine in their AFLA programs, or had strong ties with a particular faith that required the groups to follow religious doctrine.¹¹⁵ One grantee expressly ordered an employee to teach religious doctrine to the AFLA participants.¹¹⁶ Second, Kendrick alleged that three of the grantees described their purposes for existence in sectarian terms to the Secretary.¹¹⁷ Third, subgrantees did not teach birth control and based their curriculum on religious materials.¹¹⁸ Fourth, members of religious orders served instructors for the AFLA grantees.¹¹⁹ Fifth, a number of the grantees had sectarian services which immediately followed the AFLA programs, so that the AFLA clients could not distinguish who sponsored the programs.¹²⁰ Finally, many programs took place on sites adorned with religious symbols.¹²¹

Kendrick alleged that the Secretary of Health and Human Services had denied some of the grantees funding because they did not teach religion, and even notified the grantees that they were ineligible to receive funding because they were secular.¹²² No Jewish organizations received funding.¹²³

In contrast to Kendrick's allegations, the government claimed that the Secretary warned grantees not to use funds in a sectarian manner and stated that he had ceased funding one group which continued using funds in a sectarian manner.¹²⁴ Furthermore, he implied that grantees would have to disgorge funds that they used in a manner which violated the establishment clause.¹²⁵ However, he conceded that at least three grantees had used the AFLA funds in a sectarian manner.¹²⁶

115. *Id.* at 1563 (footnote omitted).

116. *Id.* at 1564-65. The grantee, St. Margaret's Hospital was "a self-described 'Christian institution' committed to acting 'in harmony with the teaching of the Catholic Church.'" *Id.* at 1564 (citation omitted).

117. *Id.* at 1565. Lutheran Family Services described in its articles of incorporation that one of its purposes of existence is "[t]o promote the extension of the kingdom of God through compassionate Christian love [and] . . . [t]o promote . . . the teaching of the Lutheran Church." *Id.* Additionally, Family of the Americas Foundation, an affiliate of WOOMB-International, stated in its "Aims and Objectives" that it was "inspired by the Encyclical *Human Vitae*, the papal encyclical setting forth Catholic dogma on birth control and abortion." *Id.* (citation omitted).

118. *Id.*

119. *Id.*

120. *Id.* at 1566.

121. *Id.*

122. Appellees' and Cross-Appellees' Brief at 8-9, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253). Rejected applicants were told that they had not received funding because their programs promised "no involvement of religious groups." *Id.* at 8 n.16.

123. Brief of the Anti-Defamation League of B'Nai B'rith on Behalf of Itself and Americans for Religious Liberty as *Amici Curiae*, in Support of Appellees at 7, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253).

124. Brief for the Appellant at 41, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253).

125. *Id.*

126. *Id.*

1. *The District Court Decision*

Using the *Lemon* test, the United States District Court for the District of Columbia examined the constitutional validity of the AFLA, both on its face and as applied. The district court concluded that the AFLA had a constitutional purpose, but that both on its face and as applied, the AFLA had the effect of promoting religion¹²⁷ and would require excessive entanglement between church and state.¹²⁸

a. The test to determine the AFLA's validity on its face

The district court applied the first prong of the *Lemon* test to determine whether the AFLA had a secular purpose.¹²⁹ The court disagreed with plaintiffs' claim that one of the statute's purposes, aiding religious groups, was unconstitutional.¹³⁰ The court stated that a statutory purpose was unconstitutional under the establishment clause only if the *sole* purpose was to aid religion.¹³¹ Because one of the statutory purposes of the AFLA was clearly to prevent teenage pregnancy, the court found the AFLA had a constitutional purpose.¹³²

The district court then examined whether the AFLA, on its face, had the primary effect of promoting religion, and thus violated the second prong of the *Lemon* test. The district court found troubling a number of aspects of the statute. First, the language of the AFLA and its legislative history show that religious groups were intended beneficiaries of grants.¹³³ Second, the AFLA's emphasis upon counseling promotes religion because the AFLA funds counseling in areas closely linked to religious issues: sexual relations and procreative issues.¹³⁴ Third, the AFLA's terms do not restrict the teaching of religion.¹³⁵ Fourth, the AFLA also had the effect of encouraging particular religious views.¹³⁶ The AFLA's prohibition against funding groups that advocate or perform abortion promoted the views of religions that consider abortion immoral.¹³⁷ Fifth, it would be unreasonable to expect the grantees

127. *Kendrick v. Bowen*, 657 F. Supp. 1546, 1560-62, 1564-67 (D.D.C. 1987).

128. *Id.* at 1568.

129. *Id.* at 1558-59.

130. *Id.*

131. *Id.*

132. *Id.* ("[T]he statute's purpose was to solve the problems caused by teenage pregnancy and premarital sexual relations. This is a valid secular purpose.") (footnote omitted).

133. *Id.* at 1561. The court stated that "AFLA money cannot impermissibly subsidize 'the primary religious mission' of the institutions that receive public funds." *Id.* (citations omitted).

134. *Id.* at 1562-63.

135. *Id.* See Note, *Kendrick v. Bowen: "Primary Effect" Analysis and the Adolescent Family Life Act*, 1988 B.Y.U. L. REV. 115, 139 ("[T]he AFLA does not satisfy the 'primary effect' prong of the *Lemon* test because it fails to provide adequate safeguards against the advancement of religion.").

136. Religious organizations often teach against premarital sexual relations and abortion. *Kendrick*, 657 F. Supp. at 1563.

137. *Id.*

from religious organizations to put their sectarian views aside in matters that are inherently religious.¹³⁸ Sixth, the teaching of religion by AFLA employees would create a symbolic link between church and state that would be especially strong because pregnant adolescents seeking advice are impressionable.¹³⁹ The court expressed a concern that adolescents would begin to associate government and religion and consider the link between them normal.¹⁴⁰ Seventh, even if it were possible for government to maintain secular counseling among religious organizations, the enforcement of such neutrality would violate the free exercise clause.¹⁴¹ Thus, the district court held that the effects of the statute were unconstitutional.¹⁴²

The district court analyzed the same three factors that the *Lemon* and *Tilton* Courts examined to determine if the AFLA, on its face, caused excessive entanglement between church and state: (1) the nature of the institutions receiving funds; (2) the types of programs that the aid funds; and (3) the relationship between church and state as government administers the aid.¹⁴³ The district court examined the first aspect of excessive entanglement, and concluded that the AFLA both as applied and on its face¹⁴⁴ required the grantees to be sectarian.¹⁴⁵ The district court held that the AFLA was invalid because extensive monitoring, and thus excessive entanglement between church and state, would be necessary to diminish the potential for sectarian use of the funds.¹⁴⁶

Second, the court feared that the nature of the aid, created a substantial danger that grantees would interject religious principles into their counseling.¹⁴⁷ The court found that religious counselors would often mix secular and religious thought. The nature of their work made the separation difficult.¹⁴⁸ The court found the facts in *Kendrick* similar to those in *Lemon*,

138. *Id.*

139. *Id.* at 1562-63.

140. The court explained its concern that "the involvement of religious organizations in counseling and education on premarital sex, abstinence, and the preferability of adoption to abortion creates a 'crucial symbolic link' between government and religion when the counseling is funded by the public." *Id.* at 1563-64.

141. *Id.* at 1563.

142. *Id.* at 1564.

143. *Id.* at 1567.

144. The court explained that "[t]he definition of 'religious organizations' so clearly means organizations with a religious character and purpose that 'one would necessarily need to consult a lawyer to effectively misconstrue it.'" *Id.* at 1567 (quoting *Logan v. United States*, 518 F.2d 143, 152 (6th Cir. 1975)).

145. *Id.* (referring to 42 U.S.C. § 300z-5(a)(21)(B) (1988)).

146. The court expressed the view that "[b]ecause these organizations have a religious character and purpose, the risk that AFLA funds will be used to transmit religious doctrine can be overcome only by government monitoring so continuous that it rise to the level of excessive entanglement." *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 615-16 (1971)).

147. *Id.*

148. *Id.* The court found that "because counseling is often done one-on-one, it is even more susceptible than teaching to the intentional or inadvertent advancement of religion." *Id.* at 1568.

because both cases involved instructors who could not easily be monitored and who taught young people, who are susceptible to indoctrination.¹⁴⁹

The district court also found the third factor, the nature of the relationship between government and religion, troubling. To maintain the secular purpose of the AFLA required entanglement between church and state. The court found this entanglement unconstitutionally excessive.¹⁵⁰

b. The AFLA as applied

Although the district court reasoned that there were sufficient grounds to invalidate some of the provisions of the AFLA on its face, it also examined whether the AFLA advanced religion as applied. The district court observed that thirteen of the AFLA grantees or subgrantees had directly taught religious doctrine in their AFLA programs or had required conformity to sectarian doctrine¹⁵¹ and ordered employees who were often members of religious orders to proselytize religious doctrine to AFLA participants.¹⁵² Finally, the fact that many programs took place on sites with religious symbols influenced the court's decision.¹⁵³ Because of the strong religious practices by many grantees and subgrantees, the district court held that the AFLA had been applied in an unconstitutional manner and ordered the Secretary of Health and Human Services not to allow religiously affiliated groups to participate in the AFLA programs.¹⁵⁴

2. *Supreme Court Opinion*

The United States Supreme Court noted probable jurisdiction of three appeals from the district court and consolidated the cases for argument.¹⁵⁵ Like the district court, the Supreme Court examined both whether the AFLA was constitutional on its face and as applied.¹⁵⁶ The majority concluded that

149. *Id.*

150. *Id.* at 1568.

151. *Id.* at 1565.

152. *Id.* at 1564-65.

153. *Id.* at 1566.

154. *Id.* at 1569.

155. On August 10, 1987, the Court stayed the district court order enjoining enforcement of part of the AFLA because of "[t]he presumption of constitutionality which attaches to every Act of Congress." 108 S. Ct. 1 (1987). The Court consolidated the cases on November 9, 1987, 108 S. Ct. 326 (1987), and granted additional motions on January 25, 1988. 108 S. Ct. 771 (1988). The Supreme Court noted jurisdiction on three appeals: (1) an appeal of the August 13, 1987 order stating that the provisions of the AFLA allowing religious groups to participate were severable from the other sections of the statute; (2) a cross-appeal by the appellees on the same issue; and (3) Bowen's appeal of the district court's denial of a "motion to clarify what the court meant by 'religious organizations' for purposes of determining the scope of its injunction." 108 S. Ct. 2562, 2569 (1988).

156. The Court's analysis was somewhat unusual for establishment clause cases to the extent that unlike most courts deciding establishment clause cases, it explicitly separated its arguments concerning the statute on its face from its arguments on whether the statute was unconstitutional as applied. *See id.* at 2569.

the AFLA was facially constitutional, and remanded the case to the district court to determine the constitutionality of the AFLA as applied.¹⁵⁷

a. The majority opinion

1. *The AFLA's facial validity.*—The Court started its analysis of the facial constitutionality of the AFLA, with the premise that a statute's purpose is consistent with the establishment clause unless it is *completely* sectarian.¹⁵⁸ The Court easily rejected Kendrick's claims that the statute had an unconstitutional purpose when it found that Congress clearly intended to help prevent teenage pregnancy when it passed the AFLA, and not to promote religion.¹⁵⁹ After concluding that the AFLA had a valid purpose, the Court examined whether the AFLA, on its face, had the effect of advancing religion by making religion a criterion for funding. The Court began by noticing that the AFLA did not limit funding to religious organizations.¹⁶⁰ Although the AFLA permits religious groups to receive funds, the Court found the AFLA merely neutral toward religion because, by its terms, it does not prohibit religious groups from participating.¹⁶¹ The Court concluded that merely allowing religious groups to participate in AFLA would have, at most, a de minimus effect of promoting religion.¹⁶²

Independent of the argument that the AFLA advanced religion by making religion a criterion for funding, the Court examined whether the AFLA promoted religion merely by directly funding religious groups for providing advice on preventing teenage pregnancy. The Court determined that because a number of community groups could participate in the AFLA programs, the statute was neutral toward religious groups.¹⁶³ Comparing the AFLA's funding of religiously affiliated organizations to subsidizing colleges and universities, the Court concluded that religiously affiliated AFLA grantees,

157. Justice Rehnquist's majority opinion was joined by Justices White, O'Connor, Scalia and Kennedy. *Id.* at 2565.

158. "[A] court may invalidate a statute only if it motivated wholly by an impermissible purpose. . . ." *Kendrick*, 108 S. Ct. at 2570 (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Stone v. Graham*, 449 U.S. 39, 41 (1980)).

159. *Id.* (citing *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987)).

160. *Id.* at 2572-73.

161. *Id.* at 2573 (citing *Grand Rapids School District v. Ball*, 473 U.S. 373, 382 (1985)). AFLA also encourages the participation of "charitable organizations, voluntary associations and other groups in the private sector." 42 U.S.C. § 300z-5(a)(21)(B) (1988) (footnote omitted).

162. The Court explained that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Kendrick*, 108 S. Ct. at 2574-75 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). See *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985) (by aiding religiously affiliated schools, state might impermissibly aid religion). The *Kendrick* Court concluded that the AFLA program was unlike the statutory program in *Meek v. Pittenger*, where the Court "struck down program that entail[ed] an unacceptable risk that government funding would be used to 'advance the religious mission.'" *Kendrick*, 108 S. Ct. at 2575 (quoting *Meek v. Pittenger*, 421 U.S. 349, 370 (1975)).

163. *Id.* at 2575.

like religiously affiliated colleges and universities, are not inherently religious.¹⁶⁴ Additionally, the Court did not find the effects of the AFLA unconstitutional merely because some of its provisions allow counseling on subjects where the principles of the AFLA overlap with religious doctrine.¹⁶⁵ Moreover, the Court has traditionally upheld governmental funding of religious organizations which serve the public through social welfare functions.¹⁶⁶ Therefore, the Court found that the AFLA's provisions funding religiously affiliated organizations did not inherently have the effect of promoting religion.¹⁶⁷

The Court responded to the argument that the AFLA had facially invalid effects by concluding that AFLA does not expressly forbid pervasively sectarian grantees from receiving federal funds.¹⁶⁸ Although the Court admitted that statutes which expressly forbid sectarian uses of governmental funds are more clearly constitutional than those that do not expressly forbid use by religious organizations, the Court found that a statute need not explicitly forbid grantees from using statutory funds in an unconstitutional manner in order to be constitutional.¹⁶⁹ The AFLA, according to the Court, does not include religion among the criteria considered for funding.¹⁷⁰ To the contrary, the Court found that the AFLA's terms provide protection against sectarian use of funds in that they explicitly state that grantees must describe in detail how they propose to use AFLA funds¹⁷¹ and require the government to evaluate the services that grantees provide.¹⁷² Thus, the Court held that the absence of an express provision against sectarian use of AFLA funds did not make the AFLA unconstitutional on its face.¹⁷³

Finally, the Court applied the third prong of the *Lemon* test to the AFLA and examined whether the statute, on its face, caused excessive entanglement

164. *Id.* at 2573-74.1

165. The Court explained as follows:

On an issue as sensitive and important as teenage sexuality, it is not surprising that the government's secular interests would either coincide or conflict with those religious institutions . . . [but] [t]he facially neutral projects authorized by the AFLA including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care . . . are not themselves 'specifically religious activities.'

Id. at 2576.

166. *Id.* at 2574 (citing *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding funds for the construction of building on property of religiously affiliated hospital that served people of all religions)).

167. *Id.* at 2574-77.

168. *Id.* at 2577.

169. *Id.* (citing *Roemer v. Board of Pub. Works*, 426 U.S. 736, 740-41, 760 (1976). *See also* *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (upholding statute limiting construction grants to religiously affiliated universities, but invalidating part of statute limiting secular restriction on funds to twenty years).

170. *Kendrick*, 108 S. Ct. at 2577.

171. *Id.* (citing 42 U.S.C. § 300z-5(a) (1982 & Supp. III 1985)).

172. *Id.* (citing 42 U.S.C. § 300z-5(b)(1)).

173. *Id.*

between government and religion.¹⁷⁴ The Court criticized the third prong as posing a "Catch-22" because the very monitoring that prevents an establishment clause violation through the promotion of religion brings about a constitutional violation through excessive entanglement.¹⁷⁵ Nevertheless, the Court did analyze the case in terms of the degree of entanglement that the AFLA would cause. The Court concluded that because the AFLA differed from statutes which provided funding for pervasively sectarian organizations, the AFLA grantees would not require continuous monitoring.¹⁷⁶ Because the limited monitoring, such as examining the AFLA educational materials and occasional visits to the premises of AFLA grantees, would not constitute excessive entanglement, the Court held that the AFLA, on its face, did not require excessive entanglement between church and state.¹⁷⁷

2. *The AFLA's validity as applied.*—The Court next examined whether the AFLA was constitutional as applied. The majority concluded that the record lacked sufficient information to show which grantees were pervasively sectarian or which factors the district court considered when it concluded that particular grantees were pervasively sectarian.¹⁷⁸ The Court recognized that the groups the district court cited for using governmental funds in a sectarian manner did not receive a substantial amount of funds.¹⁷⁹

The Court remanded the case with instructions that the district court should not consider grantees to be pervasively sectarian merely because they are religiously affiliated or motivated, or because their secular views overlap with religious doctrine.¹⁸⁰ Instead, the court instructed that the district court should determine whether any grantees applied AFLA funds toward religious activities or counseling, and whether any grantees are pervasively sectarian.¹⁸¹ The Court held that if any grantees use funds to proselytize, the district court should devise a remedy to prevent these grantees from violating the establishment clause.¹⁸²

174. *Id.* at 2577-78. The Court recognized criticism of the third prong of the *Lemon* test. *Id.* at 2578.

175. *Id.* at 2577-78.

176. *Id.* at 2578. The Court contrasted the AFLA with the statute in *Aguilar v. Felton*, 473 U.S. 402 (1985), in which the Court held that the statute directly aided pervasively religious elementary and secondary parochial schools. *Kendrick*, 108 S. Ct. at 2570 (citing *Aguilar*, 473 U.S. at 412-13). The federal statute in *Aguilar* funded public school teachers to go into parochial schools to provide remedial education and guidance services for children from low-income families. *Id.* at 2578 (citing *Aguilar*, 473 U.S. at 404-07).

177. *Id.* at 2578.

178. *Id.* at 2580.

179. The Court emphasized the fact that "only \$1.3 million" of the \$10.7 million in funding went to the projects that the district court cited for constitutional violations. *Id.* at 2575 n.12.

180. *Id.* at 2580-81.

181. *Id.*

182. *Id.* The Court also held that if the Secretary of Health and Human Services allows pervasively sectarian organizations to receive grants, the district court should apply a remedy that is consistent with the establishment clause. *Id.* at 2581-82.

b. Justice Kennedy's concurring opinion

In his concurring opinion, Justice Kennedy, who was joined by Justice Scalia, expressed his view that the district court should not have considered whether the grantees were religious.¹⁸³ According to Justice Kennedy, even if a grantee was pervasively sectarian, it was entitled to funding unless it used the AFLA funds to support its religious activities.¹⁸⁴

c. The dissent

Before applying the *Lemon* test, the dissent analyzed the majority's assumption that funding under AFLA is analogous to funding colleges and universities.¹⁸⁵ The dissent found proselytism a primary goal of many of the AFLA grantees, and therefore, the facts of *Kendrick* more analogous to the cases where the Court invalidated direct aid to elementary and secondary parochial schools.¹⁸⁶ The dissent asserted that a primary goal of both the AFLA grantees and parochial schools was the advancement of religion.¹⁸⁷ The dissent also objected to the majority's failure to look beyond whether AFLA grantees have an unconstitutionally high potential to violate the establishment clause.¹⁸⁸

Unlike the majority, the dissent did not separately examine the AFLA's constitutionality, on its face and as applied, but instead, combined the two types of statutory analysis as it applied the *Lemon* test.¹⁸⁹ The dissent first analyzed whether AFLA violated the first prong of the *Lemon* test, the purpose prong. Although Justice Blackmun found that the legislative intent behind the provisions in the AFLA allowing religious groups to participate was to help alleviate the problems of teenage pregnancy through religious indoctrination,¹⁹⁰ he found that the AFLA had a secular purpose.¹⁹¹ According to the dissent, even if Congress's funding religiously affiliated groups did not create an inherent danger of sectarian use of governmental funds,

183. *Id.* at 2582. Justice O'Connor also wrote a concurring opinion in which she stated that *Kendrick* might succeed upon remand because the record was clear enough to indicate that some of the activities of the grantees were unconstitutional, and that the district court's conclusions as to the extensiveness of these unconstitutional actions should determine the extent of the remedy. *Id.* at 2581-82.

184. *Id.* at 2582.

185. *Id.* at 2583-85 (Blackmun, J., dissenting). Justice Blackmun's dissent was joined by Justices Stevens, Brennan, and Marshall. *Id.*

186. *Id.*

187. *Id.* at 2586. (The dissent stated that the AFLA grantees had proselytism as a high priority, unlike religiously affiliated colleges and universities).

188. *Id.* at 2588.

189. *Id.* at 2583-84.

190. *Id.* at 2591 ("There is also, of course, a fundamental difference between government's employing religion *because* of its unique appeal to a higher authority . . . and government's enlisting the aid of religiously committed individuals without regard to their sectarian motivation.").

191. *Id.* at 2587.

the record demonstrated that AFLA grantees had *actually* violated the establishment clause.¹⁹²

The dissent concluded that the AFLA violated the second prong of the *Lemon* test, the effects prong, for a number of reasons. First, the dissenting Justices objected to AFLA funding of teaching materials for sectarian organizations.¹⁹³ The dissent found that funding the teaching materials would risk aiding religion to the extent that government would directly fund materials which it had not examined to determine whether they have sectarian content.¹⁹⁴ Although the Court had upheld statutes indirectly funding pervasively sectarian activities,¹⁹⁵ it used a much higher standard of scrutiny when determining whether direct funding of religiously affiliated organizations created the danger of establishment of religion.¹⁹⁶ Under this stricter scrutiny, the dissent would only approve programs that fund written materials printed by religiously affiliated organizations after careful examination to ensure that the materials were not sectarian in content.¹⁹⁷ Because the Secretary of Health and Human Services failed to screen the AFLA materials for sectarian content, the dissent determined that the Secretary was administering the AFLA in an unconstitutional manner.¹⁹⁸

Second, the dissent objected to grantees' trying to influence susceptible adolescents on matters closely interrelated to religious principles while on the grantees' property which often had religious symbols.¹⁹⁹ The dissent agreed with the district court that one would be naive to assume that religiously affiliated organizations in a religious setting would refrain from interjecting religion into subject matters that are fundamental to religious doctrine.²⁰⁰ Although religious organizations may perform clearly secular tasks with governmental funds, the risk that AFLA grantees would use funds in a sectarian manner was too great to be constitutionally permissible, especially when instructors teach young, impressionable people.²⁰¹ Third, the dissent objected to the absence of language or other controls in the AFLA forbidding the use of funds for religious purposes.²⁰² The dissent cited cases

192. For example, the dissent stated that one grantee taught that "[t]he Church has always taught that the marriage act, or intercourse, seals the union of husband and wife. . . ." Another grantee instructed to parents and adolescents, "[y]ou want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body of Christ." *Id.* at 2583 (quotations in original) (citations omitted).

193. *Id.*

194. *Id.* at 2588.

195. *Id.* at 2587 (citing *Board of Educ. v. Allen*, 392 U.S. 236 (1968)).

196. *Id.*

197. *Id.*

198. *Id.* at 2588.

199. *Id.*

200. *Id.* at 2590.

201. *Id.* at 2589-90. "There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them." *Kendrick*, 108 S. Ct. at 2591 (Blackmun, J., dissenting).

202. *Id.* at 2593-94.

in which the Court invalidated statutes which did not provide restrictions upon sectarian use or which were upheld when the statutes did contain restrictions.²⁰³ Moreover, there are no administrative regulations forbidding sectarian use of AFLA funds, such as the procedure in *Tilton*, where grantees who used funds in a sectarian manner had to refund to the government any grants they had received.²⁰⁴ The only means the Secretary had taken to prevent religious use of AFLA funds was to send a notice to grantees.²⁰⁵ Although the dissent would not invalidate a statute simply because its terms caused a remote possibility of a sectarian use of governmental funds, the dissent would not ignore the AFLA's substantial potential and actual violations of the establishment clause.²⁰⁶ The groups that the district court cited for establishment clause violations received a substantial percentage of the AFLA funds.²⁰⁷ Furthermore, the cited groups served one-third of the clients who participated in the AFLA programs.²⁰⁸

After concluding that the AFLA had the effect of promoting religion, Justice Blackmun concluded that the AFLA violates the third prong of the *Lemon* test, excessive entanglement, for two reasons. First, the dissent summarily dismissed the argument that AFLA would cause a "Catch-22."²⁰⁹ Second, the dissent repeated its contention that religiously affiliated organizations are analogous to parochial schools and, if funded, would require continuous monitoring.²¹⁰ This monitoring would cause excessive entanglement between church and state.²¹¹

The dissent next determined that excessive entanglement would take place based upon the same three factors the Court considered in *Lemon* and *Tilton*, the nature of: (1) the funded institutions; (2) the aid; and (3) the

203. *Id.* at 2593-94. The Court quoted:

Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. *Absent appropriate restrictions* on expenditures for these and similar purposes, *it simply cannot be denied* that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

Id. (quoting *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973)); *See also* *Roemer v. Board of Pub. Works*, 426 U.S. 736, 760 (1976) (statute at issue restricted use of public funds for "sectarian purposes"); *Hunt v. McNair*, 413 U.S. 734, 744 (1973) (statute prohibited use of funds for buildings or other facilities used for sectarian purposes).

204. *Kendrick*, 108 S. Ct. at 2594.

205. *Id.* at 2594.

206. *Id.*

207. *Id.* at 2585 n.3.

208. *Id.*

209. *Id.*

210. *Id.* at 2595-96.

211. *Id.*

relationship between church and state.²¹² The dissent concluded that many of the grantees were pervasively sectarian, that the activities the grantees conducted were pervasively sectarian, and that disputes would arise between grantees and government as to whether the AFLA's grantees participated in religious activities.²¹³ According to the dissent, the record demonstrated that the AFLA, on its face and as applied, promoted religion and caused excessive entanglement between government and religion.²¹⁴

III. ANALYSIS

A. AFLA's Facial Unconstitutionality

1. AFLA's Purpose

The Court unduly limited its analysis of the purpose of the AFLA. Although the Court correctly found that one purpose of the AFLA, preventing teenage pregnancy, was valid under traditional *Lemon* analysis, the Court should have extended its analysis to review other purposes of the statute.²¹⁵ Traditional *Lemon* analysis does not take into account some of the establishment clause problems that statutes such as the AFLA may cause.

The Court's limited review of a statute's purpose under the purpose prong of the *Lemon* test could lead to absurd results. Few would doubt that if Congress passed a law to form a theocracy, its purpose would be inconsistent with the establishment clause. However, under the *Kendrick* Court's analysis, Congress would not have violated the purpose prong of the *Lemon* test if the statute's purposes included the objective of gaining power and establishing order within society.²¹⁶ If promoting religion was not the statute's sole purpose, the Court would hold the purpose constitutional.²¹⁷

212. *Id.* at 2596.

213. *Id.*

214. *Id.* at 2596-97. Although the dissent did not divide its analysis into the statutory validity on its face and as applied, its overall conclusion was that the AFLA was invalid both on its face and as applied.

215. *Id.* at 2570-71. Perhaps, the reason the Supreme Court simply looked to see whether one of the purposes of a statute was constitutional was that all laws could have religious motivations. R. HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY [1594], Bk. 1, The Folger Library Edition of the Works of Richard Hooker 142 (1977). "Of lawe there can be no lesse acknowledged, than that her seat is the bosome of God, her voyce the harmony of the world, all things in heaven and earth doe her homage, the very least as feeling her care, and the greatest as not exempted from her power." *Id.* For example, simply because many of the legislators who write laws against murder are partially motivated by religious considerations would not make a law against murder inconsistent with the establishment clause. *Harris v. McRae*, 448 U.S. 297, 319 (1980). "That the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id.*

216. See *Kendrick*, 108 S. Ct. at 2571.

217. See *id.*

In order to avoid such absurd results, the *Kendrick* Court should have looked beyond the AFLA's primary secular purpose and evaluated whether the few provisions that arguably require religion have a constitutional purpose.

The Court should have looked at the wording of the AFLA and the legislative history to determine the actual purpose of the statute. Admittedly, it is difficult to determine whether the purpose of the AFLA is to promote religion, because the statutory language and the legislative history are ambiguous and perhaps contradictory.²¹⁸

As a rule, courts should presume that a statute which neither explicitly allows nor disallows religion as a criterion for funding to be constitutional on its face.²¹⁹ Courts should not hold a statute unconstitutional merely because it fails to explicitly prohibit unconstitutional application.²²⁰ The Court correctly reversed the district court's holding that the AFLA was unconstitutional solely because it does not forbid sectarian use of funds.²²¹ The district court's decision placed emphasis upon whether the statute's wording explicitly prohibited unconstitutional application, which had been of relatively minor importance in previous establishment clause cases.²²² The fact that Congress failed to explicitly restrict the use of AFLA funds to constitutional uses does not in itself create significant danger of governmental advancement of religion.²²³ The mere potential that a statute, if improperly administered, will promote an establishment of religion should not invalidate the statute.²²⁴ Thus, as the Court concluded, the Court should not substitute its judgment for the judgment of the legislature merely because the AFLA does not explicitly exclude pervasively sectarian groups from funding eligibility.²²⁵

The wording of the AFLA, however, extends beyond not prohibiting funding to some groups to specifically providing funding to religious organizations. The plain wording of the AFLA suggests that the statute is not constitutional.²²⁶ The majority misinterpreted the requirement that grant applicants "shall describe" the manner in which they will include religious

218. See *supra* notes 106-08 and accompanying text.

219. See *Kendrick*, 108 S. Ct. at 2577. As in *Tilton*, where the Court upheld the major provisions of a statute, courts should presume statutes are constitutional. See *supra* note 68 and accompanying text.

220. *Id.*

221. *Id.* at 2577.

222. *Id.* Although the district court and dissent correctly cited cases that have invalidated statutes which did not expressly forbid sectarian use of governmental funds, these cases were also invalid based upon other grounds, such as the fact that some of the statutes directly funded parochial schools.

223. *Id.*

224. Even if part of a statute is unconstitutional, courts should uphold the constitutional portions unless the legislature would not have passed the bill with only the valid sections.

225. See *Kendrick*, 108 S. Ct. at 2577.

226. *Id.* at 2572.

groups within their respective communities to mean that they must describe the manner in which they will include religious groups, *if any*, within their programs.²²⁷ Instead, the word "shall" suggests that the government must include religious groups. Thus, as the district court stated, the AFLA's provisions requiring religious participation have the purpose of promoting religion.²²⁸ Thus, the Court should have held that the AFLA violates the purpose prong of the *Lemon* test.

In addition to the wording of the statute, the legislative history of the AFLA implies that Congress intended to favor funding to religious groups. Although one could argue that the legislative history does not appear to promote religion, this interpretation seems more persuasive than the legislative history indicating that religious groups are not favored under the statute.²²⁹ The language in the Senate Committee Report on Labor and Human Resources which indicates that religion is a criterion for funding under the AFLA is sufficiently persuasive to outweigh the presumption of constitutionality of the statute. On the one hand, the Senate Report explicitly provided that religion should not be among the criteria used in selecting grantees under AFLA.²³⁰ The wording of the Senate Report suggests that religious groups should be included in the AFLA in order to resolve the moral and social problems of teenage pregnancy, and should thus be treated on an equal basis with secular groups.²³¹ On the other hand, the language of the Senate Report stated that religiously affiliated groups should be "promoted,"²³² which is hardly a neutral word. The Senate Committee's goal of "promoting" the participation of religious groups because of their ability to solve "a problem that has complex moral and social dimensions . . ." is irreconcilable with the Committee's contention that religion is not a criterion.²³³ Such a policy, because it favors religiously affiliated groups

227. *Id.* at 2573.

228. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1567 (D.D.C. 1987) (Courts should not search for hidden meanings of statutes if "one would necessarily need a lawyer to misconstrue it.") (quoting *Logan v. United States*, 518 F.2d 143, 152 (6th Cir. 1975)). See *Rubin v. United States*, 449 U.S. 424 (1981) (if Court finds "terms of a statute unambiguous, judicial inquiry is complete"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring) ("The starting point in every case involving construction of a statute is the language itself."); *Watt v. Alaska*, 451 U.S. 259, 266 n.9 (1981) (although courts should examine the legislative history, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or any thing else") (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945)).

229. See *supra* notes 103-08 and accompanying text.

230. S. REP. NO. 161, 97th Cong., 1st Sess. 16 (1981).

231. *Id.* See *Kendrick*, 108 S. Ct. at 2572.

232. S. REP. NO. 161, 97th Cong., 1st Sess. 15-16 (1981).

233. *Id.*; see Appellee's Brief at 7, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253) ("Fulfilling The AFLA's Purpose, HHS Injected Religious Bias Into The Grant-Making Process.").

and discourages the participation of secular groups, is inconsistent with establishment clause principles.²³⁴

The authors of the Senate Report and the majority in *Kendrick* mistakenly assumed that it is the government's job to determine whether adolescents are exposed to religion.²³⁵ The authors of the Senate Report seemed to assume that the amount of religion in an institution can be easily quantified when they stated that a certain amount of religion would be helpful to prevent adolescent pregnancy.²³⁶ The *Kendrick* Court accepted the Senate Report's rationale behind the purpose of the AFLA.²³⁷ The majority of the *Kendrick* Court implied that if an institution is sectarian, but has the potential to reduce teenage pregnancy, the legislature may constitutionally promote this moderate amount of religion.²³⁸

The majority in *Kendrick* should have concluded that the establishment clause forbids all legislation respecting an establishment of religion, not merely endorsement of religious orthodoxy.²³⁹ Although interpreting the establishment clause requires careful analysis,²⁴⁰ a court's responsibility is to determine whether government supports proselytism at all, not whether government is promoting proselytism to an impermissible degree.²⁴¹

The Court in *Tilton* invalidated the part of the statute which allowed colleges and universities to use federally funded buildings in a sectarian

234. *Kendrick*, 108 S. Ct. at 2591 (Blackmun, J., dissenting). The Court in *Abington School District v. Schempp* found a Pennsylvania statute that required bible reading and recitation of the Lord's Prayer in the public schools unconstitutional. The Court did not find the argument that bible reading had secular purposes like promoting moral values and teaching literature convincing. *Abington*, 374 U.S. 203, 223-24 (1963). "The *Schempp* Court rejected moral benefits and moral stabilization as secular justifications for state aid to religion. If moral stabilization is a valid secular purpose, then all sorts of aid to religion can be justified as secular in purpose, at least so long as non-religious agencies are also subsidized for their morally stabilizing effects." *Supreme Court*, *supra* note 23, at 129.

235. See S. REP. NO. 161, 97th Cong., 1st Sess. 16 (1981); *Kendrick*, 108 S. Ct. at 2590 (Blackmun, J., dissenting) ("It should be undeniable by now that religion may not be employed by government even to accomplish laudable secular purposes such as 'the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.'" (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963))).

236. See S. REP. NO. 161, 97th Cong., 1st Sess. 15-16 (1981).

237. See *Kendrick*, 108 S. Ct. at 2571 ("There simply is no evidence that Congress' 'actual purpose' in passing the AFLA was one of 'endorsing religion'").

238. *Id.*

239. *Lemon v. Fitzgerald*, 403 U.S. 602, 612 (1971). The *Lemon* Court stated that it must be certain that teachers do not teach religion. See *supra* note 40.

240. See *Roemer v. Board of Pub. Works*, 426 U.S. 736, 766 (1976) ("There is no exact science in gauging the entanglement of church and state.").

241. When the *Lemon* Court stated that it must be certain that public school teachers do not teach religion, it implied that the teaching of *any* religion was impermissible. *Id.* See also *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (state may not promote traditional religion or a "religion of secularism"). "Obviously a direct money subsidy [to religion] would be a relationship pregnant with involvement [between government and religion]." *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970).

manner after twenty years, while maintaining the main provisions of the statute.²⁴² Similarly, if some sections of the AFLA have the purpose of promoting religion, those sections should be held unconstitutional.²⁴³ The Court invalidated a part of a statute in *Tilton* because that section violated the establishment clause,²⁴⁴ yet in *Kendrick*, the Court decided it should not invalidate a part of a statute with a sectarian purpose unless the statute's sole purpose is sectarian.²⁴⁵

2. *The AFLA's Effect*

While the *Kendrick* Court correctly concluded that the AFLA, on its face, may not necessarily be applied in a manner that promotes religion, the Court restated the effects prong of the *Lemon* test in a manner inconsistent with the wording of the *Lemon* test, and thus provided precedent for courts to find a statute which promotes religion constitutional.²⁴⁶

Using the *Lemon* test, the *Kendrick* Court correctly concluded that the AFLA does not promote religion merely because some of the principles of religiously affiliated groups overlap with Congress's rationale behind creating the AFLA.²⁴⁷ Although the AFLA might advance the principles of some religious groups because it forbids funding to groups that advocate abortion or abortion counseling, this does not impermissibly advance religion.²⁴⁸

However, the reason that the Supreme Court in *Kendrick* reached the erroneous conclusion that the AFLA, on its face, does not promote the establishment of religion is that the Court distorted the second prong of the *Lemon* test.²⁴⁹ The *Lemon* Court concluded that a law's "principal or primary

242. *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971). The analogy to *Tilton* is limited to the extent that the Court held that the provision in *Tilton* was unconstitutional effect and did not hold that there was a sectarian purpose. *Id.* Nevertheless, the *Tilton* Court did not limit the Court's discretion to sever an unconstitutional section from a statute to cases where the effect of the statute was unconstitutional. *Id.*

243. *Id.*

244. *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971) (invalidating the portion of a statute which allowed colleges and universities to use buildings constructed with federal funds for sectarian purposes after twenty years).

245. *Kendrick*, 108 S. Ct. at 257-72 (court looked at primary purpose of statute).

246. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (Court reviewed whether primary effect of displaying creche was greater endorsement of religion than other cases where Court found no endorsement).

247. *Kendrick*, 108 S. Ct. at 2581.

248. *Id.*; *Harris v. McRae*, 448 U.S. 297, 301 (1980). *Harris* held that Title XIX does not require states that receive Medicaid reimbursement to pay for medically necessary abortions. *Id.* at 316-17. Furthermore, "the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." *Id.* at 319-20.

249. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984). In *Lynch*, the Court changed the effects prong of the *Lemon* test in a manner which may result in upholding laws that are clearly unconstitutional:

But to conclude that the primary effect of including the creche is to advance religion

effect must be one that neither advances nor inhibits religion.”²⁵⁰ which the *Kendrick* Court restated as whether a statute’s “primary effect is the advancement of religion.”²⁵¹

The following example illustrates the significance of the manner in which the *Kendrick* Court distorted the *Lemon* test. If the Court examined the primary effect of a bill that had the following two provisions: the first granting one thousand dollars to the Catholic Church and, another, that balanced the national budget, the Court might find that the amount of money spent to support Catholicism was minimal. If the Court applied the analysis it used in *Kendrick* to this situation, it would hold that the statute was facially valid because the primary effect, establishing the national budget, is secular. However, under the more reasonable approach applied in *Committee for Public Education & Religious Freedom v. Nyquist*,²⁵² the Court would hold that the statute also has the secondary effect of promoting the religious beliefs of the Catholic Church, and would therefore, be inconsistent with the establishment clause.²⁵³

Preventing teenage pregnancy was held to be a permissible primary effect under *Kendrick*, even though this primary effect might have a secondary effect which advances religion.²⁵⁴ The *Kendrick* Court should have invalidated the part of AFLA which promoted religion in the same way the *Tilton* Court invalidated part of the HEFA.²⁵⁵ The Court in *Tilton v. Richardson* applied the effect prong of the *Lemon* test correctly.²⁵⁶ The *Tilton* Court upheld only the provisions of the challenged statute which had the primary effect of aiding education.²⁵⁷ Therefore, the Court invalidated the section of the statute which allowed the sectarian use of the buildings after twenty years because the statute had the secondary effect of promoting religion.²⁵⁸

3. Excessive Entanglement

The *Kendrick* Court’s final error was its failure to recognize the excessive entanglement of government and religion which may result from the operation of the AFLA. While the AFLA, on its face, does not inherently violate

in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools . . .

Id. The *Kendrick* Court maintained this change. *Kendrick*, 108 S. Ct. at 2570.

250. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

251. *Kendrick*, 108 S. Ct. at 2570.

252. 413 U.S. 756 (1973).

253. *Id.* at 783-85 n.39.

254. *Id.*; *Kendrick*, 108 S. Ct. at 2570.

255. 403 U.S. 672, 683 (1971).

256. *Id.* at 672.

257. *Id.*

258. *Id.* at 682-84 (1971).

any of the three factors which the Court looked at to determine whether a statute unconstitutionally entangles government with religion, it is impossible to positively determine whether the AFLA's grantees will be pervasively sectarian by examining the statute on its face; the AFLA does not explicitly require that any grantees be pervasively sectarian.²⁵⁹

Although the nature of the aid, teaching and counseling, creates the danger of governmental endorsement of religion when government provides the grants to pervasively sectarian organizations, the Secretary of Health and Human Services could decide not to fund pervasively sectarian organizations, and thus administer the AFLA in a constitutional manner.²⁶⁰ Similarly, if the grantees are not pervasively sectarian, there would be little risk that the statute, on its face, would promote excessive entanglement.²⁶¹

Nevertheless, it would be unrealistic to expect the Secretary of Health and Human Services to apply the AFLA in a constitutional manner. The language and purpose of the AFLA invites the Secretary to promote religion and create excessive entanglement.²⁶² The Court should invalidate a statute if grantees are likely to use a substantial percentage of its funds in a manner which would violate the establishment clause.²⁶³ The majority in *Kendrick* ignored the emotional impact of the issues of premarital sex and abortion when it presumed that religiously affiliated grantees will not invoke religion.²⁶⁴ Just as the *Lemon* Court concluded that it was unrealistic to expect parochial school teachers to separate their religious beliefs from secular lessons,²⁶⁵ it is also unrealistic to expect members of religiously affiliated organizations to counsel teenagers about procreative issues in purely secular ways.²⁶⁶ The AFLA grantees are likely to use a substantial percentage of the AFLA funds in a manner that promotes religion if the AFLA is administered in a manner consistent with its purpose.

259. *Kendrick*, 108 S. Ct. at 2573.

260. *Id.* at 2573-77. The Secretary claimed that he stopped funding those grantees which used the AFLA funds in a sectarian manner. In *Waltz*, New York City exempted all the property of religious organizations used solely for religious worship from property tax, so unlike *Kendrick*, the governmental officials had little, if any, discretion to decide which groups deserved a benefit. *Waltz v. Tax Commission*, 397 U.S. 664 (1970).

261. *Kendrick*, 108 S. Ct. at 2577-79. Although the Court concluded the AFLA could hypothetically be applied in a constitutional manner, this is not "as applied" analysis. The Court looked to whether the AFLA has constitutional effects, on its face, when it examined whether the Secretary of Health and Human Services could apply the AFLA in a constitutional manner. "As applied" analysis concerns whether the Secretary has *actually* applied the statute in a manner that does not promote religion. *Id.* at 2578-81.

262. See S. REP. NO. 161, 97th Cong., 1st Sess. 16 (1981).

263. As in *Lemon*, the government cannot be certain that religious organizations will use AFLA funds in a secular manner. See *supra* notes 38-40 and accompanying text. As in *Aguilar*, the statute is likely to have an effect of promoting religion when the grantees are pervasively sectarian. See *supra* note 46.

264. *Bowen v. Kendrick*, 108 S. Ct. 2562, 2586 (1988) (Blackmun, J., dissenting).

265. *Lemon v. Kurtzman*, 402 U.S. 602, 618 (1971).

266. *Kendrick*, 108 S. Ct. at 2586 (Blackmun, J., dissenting).

To prevent AFLA funded organizations from using the funds for unconstitutional purposes the government would need to establish a substantial bureaucracy in order to prevent pervasively sectarian organizations from participating in the AFLA. Governmental monitoring of religious groups would create resentment along religious lines and would create excessive entanglement between church and state. The *Kendrick* Court presumed that AFLA grantees, like colleges and universities, were not pervasively sectarian.²⁶⁷ Thus, the Court overlooked the likelihood that the AFLA will require a choice between enduring pervasively sectarian grantees and excessive entanglement between church and state.²⁶⁸

4. Criticism of the Lemon Test

If the Court properly applies the effects prong of the *Lemon* test, the purpose prong serves little function.²⁶⁹ By eliminating the purpose prong, the Court could significantly simplify application of the establishment clause to funding programs. The Court has failed to adequately explain why it was so concerned about invalidating a statute with sectarian purposes, which under the *Lemon* test, is invalid even if the statute's likely effects are secular.²⁷⁰ The statutory purpose is only relevant to the extent that it indicates its likely effects.

The Court could further simplify the *Lemon* test if it recognized the interdependence of the entanglement prong and the effects prong.²⁷¹ Whenever the Court has found that a statute is likely to cause excessive entanglement, it has implied that entanglement between government and religion would be necessary to prevent unconstitutional effects.²⁷² As Justice O'Connor has stated, excessive entanglement is a constitutionally impermissible effect of a statute, so it does not need to be an independent prong.²⁷³ Thus, the second and third prongs of the *Lemon* test are interdependent and inseparable when deciding the constitutionality of a funding program.

In other words, a statute that causes or which poses a substantial risk of causing effects violative of the establishment clause is invalid because it would require excessive entanglement between church and state to eliminate the unconstitutional effect.²⁷⁴ The Court could achieve its goals of preventing

267. *Id.* at 2575.

268. *Id.*

269. McConnell, *supra* note 4, at 49. "The motivations of legislators may be evidence of how the accommodation will function in practice. But the ultimate inquiry should be directed not at legislative motivation—which may or may not predict results—but on effects." *Id.*

270. *Id.* at 48.

271. *Aguilar v. Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting) ("Pervasive institutional involvement of church and statute may remain relevant in deciding the effect of a state which is alleged to violate the Establishment Clause.") (emphasis in original).

272. See, e.g., *Lemon*, 403 U.S. 602 (1971).

273. *Aguilar v. Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting).

274. *Id.*

funding programs respecting an establishment of religion with one test: a funding program violates the establishment clause if it creates substantial potential for a choice between promoting religion, and extensive monitoring to prevent such a promotion.²⁷⁵

The AFLA requires a choice between advancing religion and excessive entanglement between government and religion.²⁷⁶ It is unlikely that the Secretary of Health and Human Services will apply the AFLA in a secular manner because a secular application of the statute would be inconsistent with the language and the legislative intent of the AFLA.²⁷⁷ Furthermore, religiously affiliated AFLA counselors will be unlikely to separate their religious views from their secular ones.²⁷⁸ As in *Lemon*, the AFLA funds teaching, which is difficult to monitor, and thus creates the constitutionally impermissible effect of excessive entanglement between church and state.²⁷⁹

In fact, counseling teenagers about procreative matters would pose a greater risk of religious indoctrination than teaching less personal academic subjects.²⁸⁰ Furthermore, the Secretary of Health and Human Services is not likely to have the administrative ability to monitor the counseling at all AFLA functions that religiously affiliated grantees coordinate.²⁸¹ Even if the government attempts to monitor all the functions of religiously affiliated grantees, the grantees are likely to resent the monitoring. If grantees resent such governmental monitoring, political divisions along religious lines will develop, and religious intolerance will increase.²⁸² Thus, the Court should have banned funding of religiously affiliated AFLA grantees and applicants.

B. *The AFLA as Applied*

Although the *Kendrick* Court stated that there was not enough evidence in the record to determine whether the AFLA had been applied in a consti-

275. *Id.*

276. See *Kendrick*, 108 S. Ct. 2562, 2583-85 (Blackmun, J., dissenting) (1988).

277. See *supra* notes 105-08 and accompanying text.

278. *Kendrick*, 108 S. Ct. at 2588 (Blackmun, J., dissenting).

279. The *Lemon* Court concluded that the degree of certainty needed to insure that parochial schools do not promote religion could only be achieved by totally banning direct funding of the parochial schools or requiring monitoring that would result in excessive entanglement between church and state. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 341-42 (Lee concluded that the entanglement prong burdens religions which are willing to endure governmental restrictions of funds, and thus, the entanglement prong itself is an impermissible entanglement between government and religion); *contra* Choper, *The Religion Clauses of the Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) ("I believe that avoidance of church-state entanglement, at the expense of forsaking legitimate secular pursuits or the more general pursuit of preserving religious liberty, is mandated neither by the Establishment Clause nor good sense.").

280. See *Kendrick*, 108 S. Ct. at 2586 (Blackmun, J., dissenting).

281. See *Lemon*, 403 U.S. at 622 (for application of problems stemming from monitoring religious grantees).

282. See *id.*

tutional manner, the record reveals substantial evidence that AFLA grantees actually proselytized and required their employees to teach religion.²⁸³ Furthermore, the record reveals that the Secretary of Health and Human Services discriminated against grantees which did not have a religious affiliations and continued funding those grantees which proselytized.²⁸⁴

The Court's ruling on whether the district court may, on remand, find that the AFLA was unconstitutional as applied was rather ambiguous.²⁸⁵ The Court stated that the Secretary informs grantees that they may not use funds in a sectarian manner, and thus the Secretary forbids grantees from teaching or promoting religion.²⁸⁶ Nevertheless, the Court held that the district court may determine a remedy to insure that the Secretary complies with the establishment clause if the district court finds that the Secretary allows particular grants which have the main effect of promoting religion.²⁸⁷ Thus, in a contradictory manner, the Court stated both that the Secretary does not allow unconstitutional effects, but the district court may restrict the Secretary's administration of AFLA if the Secretary does allow unconstitutional effects.²⁸⁸

In order to determine whether the Secretary applied the AFLA in a sectarian manner, it is helpful for one to compare the AFLA grantees to pervasively sectarian institutions, such as parochial schools, and to primarily secular institutions, such as colleges and universities. Using such a comparison, the *Kendrick* Court should have considered many of the AFLA recipients be pervasively sectarian. For example, in *Lemon v. Kurtzman*, where the statutes funded religious elementary and secondary schools, the instructors' handbooks required teachers not to deviate from religious principles.²⁸⁹ Similarly, some of the AFLA grantees require in their articles of incorporation that employees may not deviate from religious doctrine.²⁹⁰ Additionally, students at parochial schools, like the AFLA program participants, were young and impressionable.²⁹¹

In contrast, in *Tilton v. Richardson*,²⁹² in which the Court upheld the constitutionality of a statute which provided construction grants for colleges

283. *Kendrick v. Bowen*, 657 F. Supp. at 1565 (D.D.C. 1987).

284. See generally Brief for Appellees and Cross-Appellants, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253).

285. See *Kendrick*, 108 S. Ct. at 2581.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Lemon*, 403 U.S. at 618.

290. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1565 (D.D.C. 1987). Although all religiously affiliated groups would not necessarily have such strict rules, the Secretary of Health and Human Services has done little to prevent pervasively religious groups from participating in the AFLA. See Appellees' and Cross-Appellees' Brief at 8-9, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253).

291. *Bowen v. Kendrick*, 108 S. Ct. 2588 (1988).

292. 403 U.S. 672 (1971).

and universities, no religious principles or restrictions were imposed upon employees.²⁹³ Thus, the facts of *Kendrick* resemble the facts of *Lemon* more than the facts of *Tilton*.

The majority concluded that evidence on the record indicated that some of the grantees had used funds in an unconstitutional manner.²⁹⁴ The Court, however, was unreasonable in concluding that the record did not clearly indicate whether the Secretary of Health applied AFLA in an unconstitutional manner.²⁹⁵ There was no legitimate reason to remand the case.²⁹⁶ There were no substantial disputes about the facts.²⁹⁷

The Court did not sufficiently consider the conclusiveness of the evidence on the record that grantees had used AFLA funds to promote religion.²⁹⁸ Even if most AFLA grantees acted in a secular manner, the Court should have found that this is irrelevant to the statute's constitutionality.²⁹⁹ The constitutionality of funding the secular grantees should be considered irrelevant to the issue of the constitutionality of funding the religiously affiliated groups.³⁰⁰ Furthermore, the Court in *Kendrick* never addressed Justice Blackmun's concern that grantees did not have to report the manner in which their subgrantees spend funds; many of the subgrantees might have used funds in a sectarian manner in order to meet AFLA's alleged requirement of involving community religious groups.³⁰¹ Thus, the Court should have held that the AFLA has been applied in an unconstitutional manner.

Whether the percentage of religiously affiliated grantees that have used AFLA grants in a sectarian manner is forty percent, as the majority in *Kendrick* contended,³⁰² or sixty percent, as the dissent contended,³⁰³ the percentage was substantial.³⁰⁴ When it is likely that a statute will fund grantees

293. *Id.* at 686-87.

294. *Kendrick*, 108 S. Ct. at 2580.

295. *Id.* at 2585 (Blackmun, J., dissenting).

296. *Id.* at 2596-97 (Blackmun, J. dissenting).

297. Cross-Appellant's Reply Brief at 5, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253). "Even at this late date, the appellants do not 'dispute' any of the facts that were uncontroverted and presented to the district court." *Id.*

298. *See Kendrick*, 108 S. Ct. at 2585 n.3. (Blackmun, J., dissenting).

299. *Id.* at 2585 n.3 (Blackmun, J., dissenting).

300. *Id. Cf. Mueller v. Allen*, 463 U.S. 388, 397 (1983) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.") (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

301. Justice Blackmun expressed his concern as follows:

[B]ecause of the Government's failure to require grantees to report on subgrant and subcontract arrangements, . . . we can only speculate as to what additional public funds subsidized the religious missions of groups that the secular grantees brought in to fulfill their statutory obligation to involve religious organizations in the provision of services.

Kendrick, 108 S. Ct. at 2585 (Blackmun, J., dissenting) (citing 42 U.S.C. § 300z-5(a)(21)(B) (1988)).

302. *Kendrick*, 108 S. Ct. at 2575 n.12.

303. *Id.* at 2585 n.3 (Blackmun, J., dissenting).

304. *Id.* at 2575, 2585 (Blackmun, J., dissenting).

in a manner which permits a significant portion of the grants to aid pervasively sectarian groups, the Court has held that the provisions of the statute that aid religiously affiliated groups unconstitutional.³⁰⁵ Thus, the Court should have held that the AFLA had been applied in an unconstitutional manner.³⁰⁶

Although the Secretary contended that he had applied the AFLA in a constitutional manner, he conceded that three grantees used AFLA funds in a sectarian and unconstitutional manner.³⁰⁷ The Secretary contended that two grantees were warned to stop using funds in a sectarian manner.³⁰⁸ Nevertheless, there is little, if any, evidence to support the Secretary's argument that grantees that violated the establishment clause no longer received benefits under AFLA.³⁰⁹ Although the Secretary stopped giving funds to one of the grantees that the district court cited for constitutional violations, the record indicates that the reason the Secretary denied funding to the grantee, Catholic Charities of Arlington, was that it did not reach out into the community sufficiently.³¹⁰ Even if the Secretary correctly argued that the Catholic Charities program lost its funding because of sectarian teaching, the Secretary's way of reprimanding Arlington was not consistent with *Tilton v. Richardson*.³¹¹ Instead of requiring grantees to return funds used in an unconstitutional manner, as the federal government required in *Tilton*,³¹² the Secretary actually gave Catholic Charities additional funds to wrap up its program.³¹³ The Secretary failed to make a substantial effort to enforce the establishment clause.³¹⁴

The Secretary's other administrative actions also did not support his contention that he had actively prevented proselytism with governmental funds.³¹⁵ Although the Secretary of Health and Human Services sent a notice to grantees which stated that grantees may not proselytize, there is little basis to conclude that the notice significantly changed the enforcement of AFLA.³¹⁶ The notice might have been a mere attempt to defend the AFLA against legal challenges, without any attempt to enforce the notice because the Secretary did not send out the notice until Kendrick challenged the constitutionality of the AFLA.³¹⁷ Thus, there is little basis to conclude that

305. *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971).

306. *See supra* notes 46, 67.

307. Brief for the Appellant at 41, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253).

308. Brief at 742-43.

309. *Id.* at 517-19, 675-76, 742-43.

310. *Id.* at 742-43.

311. 403 U.S. 672 (1971).

312. *Id.* at 682-84.

313. *Id.* at 742-43 (joint appendix).

314. *Id.*

315. *Contra* Brief for the Appellant at 41, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253) ("Finally, where there were departures from proper constitutional practice, they were met by firm action by the Secretary.").

316. *See Kendrick*, 108 S. Ct. at 2594 (Blackmun, J. dissenting).

317. *Id.*

the Secretary applied the AFLA in a manner consistent with the establishment clause.³¹⁸

Even if the AFLA did not advance sectarian views, the Court should have held that the AFLA was unconstitutional as applied because the Secretary denied grants to potential grantees which did not include the participation of religious organizations.³¹⁹ Under the Office of Adolescent Pregnancy Programs ("OAPP"), the AFLA reviewed its reasons for determining why the Secretary denied grants to some potential grantees.³²⁰ Although the district court did not make any findings on whether the Secretary used religion as a criteria for aid, sectarian grant applicants who were inexperienced in preventing teenage pregnancy were sometimes accepted instead of experienced secular grantees.³²¹ Some potential grantees were even notified that the reason that they were denied grants was their failure to include religion in their programs.³²²

Although the Court has upheld laws which incidentally promote religion, the sectarian effects of the AFLA are substantial and are distinguishable from the sectarian effects that the Court has considered incidental in *Lynch v. Donnelly*.³²³ The AFLA was adopted in 1981, so it does not qualify under the "traditional" test applied in *Marsh v. Chambers* and *Lynch*.³²⁴ Unlike the creche in *Lynch*, which cost about \$20 a year to put together and dismantle, funding religiously affiliated AFLA groups has cost taxpayers \$16 million since 1982.³²⁵

C. Justice Kennedy's Concurring Opinion

In his concurring opinion, Justice Kennedy indicated that he would weaken the *Lemon* analysis substantially. Justice Kennedy's opinion conflicts with *Lemon*, where the Court ruled that the government may not fund grantees that are pervasively sectarian for activities in which there is some danger of religious indoctrination.³²⁶ Justice Kennedy would condition the enforcement of the establishment clause upon the Secretary's: (1) ability to detect viola-

318. *Id.*

319. Appellees' and Cross-Appellees' Brief at 8-9, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253). Rejected applicants were told that they had not received funding because their programs promised "no involvement of religious groups," *Id.* at 8 n.16. See Notices, 8682, 8684, (Mar. 1, 1982). "All Demonstration Projects The following requirements . . . prevention services. . . Applicants shall include innovative approaches as appropriate for encouraging and supporting the involvement of families, religious and charitable organizations and voluntary associations in the provision of services." *Id.*

320. Brief at 8 n.15.

321. *Id.* at 8-9.

322. *Id.* at 8 n.16.

323. 465 U.S. 668 (1978).

324. See *Kendrick*, 108 S. Ct. at 2566.

325. *Id.* at 2585 n.3 (Blackmun, J., dissenting).

326. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 762 (1976); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

tions; (2) willingness to enforce the Constitution; (3) interpretation of the Constitution; and (4) administrative power to prevent grantees from using funds in a sectarian manner.³²⁷ Justice Kennedy failed to recognize that under the *Lemon* test, the Court does not even need to look at how the funds are being used if the institutions are pervasively sectarian and resulting in a substantial risk of sectarian use of the funds.³²⁸ The Secretary should not be able to circumvent *Lemon* by applying an allegedly secular statute in a sectarian manner.³²⁹ If the majority adopted Justice Kennedy's approach, the Secretary could fund parochial schools with AFLA funds and maintain the funding until the grantees were caught using funds in a sectarian manner.³³⁰ It would be expensive, if not impossible, for the Secretary to monitor such funding.³³¹ Even if a parochial school that was an AFLA grantee was caught teaching sectarian ideas about teenage pregnancy, it could claim that the particular dollars spent on such teaching were not the AFLA funds.³³²

Instead of only looking to the manner in which AFLA funds are used, the Court should consider both the religious character of the institutions and the evidence of how grantees have used the funds.³³³ Pervasively sectarian groups should not be able to receive funds, and those grantees which are not sectarian should be eligible for funds under the establishment clause unless there is evidence of sectarian use.³³⁴

IV. IMPACT

Barring an extreme situation, the Court seems to be unwilling to invalidate a statute on its face that includes religiously affiliated organizations among its grantees, unless the grantees are parochial schools.³³⁵ Thus, even if there is substantial risk that grantees will use funds in an unconstitutional manner, the Court is not likely to invalidate a challenged statute, on its face.³³⁶ The Court is likely to uphold a statute unless almost all of the grantees are inherently and pervasively sectarian, as in the parochial school cases.³³⁷

The *Kendrick* Court sought to significantly reduce the range of governmental actions which constitute an establishment of religion.³³⁸ The Court is likely to uphold the constitutionality of some projects which create a substantial risk of pervasively sectarian use of governmental funds.³³⁹ Further-

327. *Lemon*, 403 U.S. 602 (1971).

328. *Kendrick*, 108 S. Ct. at 2580 (Kennedy, J., concurring).

329. *See Lemon*, 403 U.S. at 602.

330. *See Kendrick*, 108 S. Ct. at 2582 (Kennedy, J., concurring).

331. 42 U.S.C. § 300z-8.

332. *Id.*

333. *See Lemon*, 403 U.S. at 602; *Tilton v. Richardson*, 403 U.S. 672 (1971).

334. *Lemon*, 403 U.S. at 602; *Tilton*, 403 U.S. at 672.

335. *See Bowen v. Kendrick*, 108 S. Ct. 2562 (1988).

336. *Id.* at 2582-85 (Blackmun, J. dissenting).

337. *See, e.g., Lemon*, 403 U.S. at 602.

338. *See Kendrick*, 108 S. Ct. at 2573-74, 2580-81.

339. *Id.*

more, the majority in *Kendrick* implied that it can still preserve the establishment clause even if the Court constricts the definition of pervasively sectarian.

The Court will probably allow religion to be among the criteria for funding programs in a rather restrictive sense.³⁴⁰ The *Kendrick* Court seems to permit religion as among the criteria for funding grantees, but does not permit religion to be an exclusive factor. For example, the AFLA requires grantees to promote community involvement. Thus, if groups A and B seek funding, A promotes no community involvement and B promotes only religious community involvement, it is likely that the Court would permit the Secretary to favor B over A. The Court would reason that B received funding because it promoted community involvement, and not because it promoted religion. Thus, B could have promoted community involvement among other groups than religious groups, and therefore, is not being discriminated against because it did not promote religion.³⁴¹

Because of the Court's unwillingness to find that the AFLA has been applied in an unconstitutional manner, it risks creating political divisions along religious lines, which would run contrary to the policies behind the formation of the establishment clause.³⁴² Political conflict on religious grounds would spread from issues such as abortion and funding of parochial schools to the subject of how to prevent teenage pregnancy.³⁴³ Even if religions other than Christianity³⁴⁴ were represented under the AFLA, the AFLA could still divide people along religious lines.³⁴⁵ The AFLA forbids funding of groups that advocate abortion.³⁴⁶ If AFLA grantees advocate their views about premarital sex, birth control and abortion in a sectarian manner, religious groups with opposing views might resent governmental funds supporting these views.³⁴⁷ Moreover, the controversy behind whether religious groups may hire members of their own faith with governmental funds is likely to escalate.³⁴⁸ Thus, the *Kendrick* Court should have held that the AFLA risks

340. See *id.* at 2573-74, 2580-81.

341. *Id.*

342. See *supra* note 12; *contra* Choper, *supra* note 279, at 683. "[A]voidance of political strife along religious lines neither should, nor can, represent a value to be judicially secured by the Establishment Clause." *Id.*

343. Brief of the Anti-Defamation League of B'Nai B'rith on Behalf of Itself and Americans for Religious Liberty, as *Amici Curiae*, in Support of Appellees at 7, *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (No. 87-253).

344. No Jewish groups received funding under the AFLA. *Id.* ("The Record Shows Participating Religious Organizations Are Exclusively Christian and the Programs Involve Promulgation of Christian Doctrine.").

345. See *Kendrick v. Bowen*, 657 F. Supp. 1547, 1562 (D.D.C. 1987).

346. 42 U.S.C. § 300z-10(a) (1988).

347. See *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971).

348. See Chopko, *Don't Exclude the Churches*, NAT'L. L.J., Feb. 29, 1988, at 14, col 1. Objecting to proposed congressional restrictions upon religious discrimination in governmentally funded programs, Chopko stated: "How is religious liberty strengthened by demanding an end of member [hiring] preferences?" "How is the public benefitted if religious groups are forced

intensifying political division along religious lines.³⁴⁹

The impact of *Lemon* will grow weaker as the Supreme Court permits effects which indirectly promote religion.³⁵⁰ As the Supreme Court applies its cramped interpretation of the second prong of the *Lemon* test, Congress is likely to test the Supreme Court with statutes which have secondary effects of promoting religion as a criterion.³⁵¹ Congress will probably form programs similar to AFLA in other areas. For example, Congress might fund religious organizations to participate in drug testing. Even more likely, Congress might fund religious organizations to expand child care programs and for the homeless.³⁵² Ironically, those who support social welfare may join with others in support of religious organizations to increase funding of religiously affiliated organizations.³⁵³

Finally, it is difficult to predict how *Kendrick* will effect teenage pregnancy rates. If the Court had ruled that the AFLA is completely unconstitutional, Congress might have enacted a bill funding only secular groups. If the Court had forbidden religious groups from participating, perhaps there would be a sufficient number of worthy secular grantees for the Secretary to efficiently allocate its entire budget. Furthermore, it is difficult to determine whether AFLA reduces pregnancy rates at all, let alone whether religion contributes to reducing teenage pregnancy rates.³⁵⁴ The only study on the effects of AFLA on adolescent pregnancy rates published at the time of this Note indicated that the AFLA program did reduce pregnancy rates.³⁵⁵ The authors stated that religious groups did participate in the program, but the authors were unable to determine what factors contributed to the reduction of pregnancy rates.³⁵⁶

to avoid providing child care under these circumstances?" *Id.* Mark E. Chopko is general counsel of the National Conference of Catholic Bishops and the United States Catholic Conference in Washington D.C. See also Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862 (1987). Under Title VII, religious groups may discriminate against members of other faiths in nonprofit activities in order to "carry out their religious missions." *Id.* at 2870. Nevertheless, this free exercise rationale may not apply to governmental programs, in which religious groups may choose not to participate. If governmentally funded religiously affiliated groups have the privilege of discriminating on the basis of religion, a privilege which secular groups do not have, this privilege might violate the establishment clause. See *supra* note 12 (government should be neutral between religious and secular groups).

349. See *Lemon*, 403 U.S. at 622-24; *Kendrick*, 657 F. Supp. at 1569.

350. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

351. See *Kendrick*, 108 S. Ct. at 2570.

352. *Debate Over Day-Care Bill Spurs Odd Alliances And Raises Issue of Church State Separation*, Wall St. J., Aug. 30, 1988, at 30.

353. *Id.*

354. Telephone interview with Dennis McBride, PhD., sociology, Washington State (Oct. 11, 1988).

355. Vincent, Clearie & Schluchter, *Reducing Adolescent Pregnancy Through School and Community-Based Education*, J. A.M.A., June 26, 1987, at 3382-86.

356. *Id.*

V. CONCLUSION

In *Bowen v. Kendrick* the Court held that funding religiously affiliated groups, among other groups, for the purpose of preventing teenage pregnancy was not facially unconstitutional. The Court remanded the case to the district court to determine if the Secretary had applied the AFLA in a constitutional manner. The Court should have held that the AFLA is unconstitutional on its face. Under traditional *Lemon* test analysis, one of the AFLA's purposes is secular, so the purpose is constitutional. However, the AFLA also has the purpose of promoting religion. The Congress intended religious groups which participate in the AFLA to promote morality, instead of allowing religiously affiliated groups to participate for secular reasons, such as the tendency of religiously affiliated groups to be active in charitable pursuits.

Thus, the effects of AFLA are likely to cause excessive entanglement. Although the AFLA could hypothetically be administered in a manner that does not promote religion, such results are unlikely because of the AFLA's sectarian purpose and the plain meaning of the statute. Furthermore, the AFLA is likely to promote excessive entanglement between church and state if the government tries to counteract the promotion of religion by monitoring the religious groups. Excessive entanglement will cause the religiously affiliated groups to resent governmental monitoring, will increase political divisions along religious lines, and will increase religious intolerance.

Even if the Court correctly upheld the AFLA on its face, it should have held that the AFLA has been applied in an unconstitutional manner. A significant portion of the AFLA grantees have carried out their programs in a sectarian manner, and the Secretary has done little to prevent sectarian grantees from continuing to indoctrinate with governmental funds. In the early years of the AFLA, the Secretary denied funds to groups which were purely secular. Although the majority in *Kendrick* claimed that the evidence of establishment clause violations was inconclusive, the evidence was substantial.

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